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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

No. 612

MILTON H. OLENDER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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## PETITION FOR A WRIT OF CERTIORARI
**to the United States Court of Appeals for the Ninth Circuit.**

The petition of Milton H. Olender for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows:

### THE OPINIONS BELOW.

The opinion of the Court of Appeals affirming the judgment (R. 968) (not yet reported) is printed in the Appendix hereto at page i.

The opinion of the Court of Appeals on denying a rehearing (R. 982) (not yet reported) is printed in the Appendix hereto at page xvii.

No opinion was rendered by the U.S. District Court.

There was a prior appeal and the opinion of the Court of Appeals is reported in 210 F. 2d 795.

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## JURISDICTION.

The judgment of the Court of Appeals (R. 980) was made and entered on September 24, 1956. It is set forth in the Appendix hereto at page xvi.

The order denying a rehearing was made and entered on November 8, 1956. (R. 982.)

The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1254(1).

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## THE QUESTIONS PRESENTED.

In a prosecution for income tax evasion for the years 1945 and 1946, based on the "net worth" method of proof

(a) Can the conviction be upheld where the presecution fails to establish to a reasonable certainty the net worth of accused at the beginning and end of 1945?

(b) Where the evidence established that at the time of the opening net worth period the accused was possessed of a substantial though undetermined amount of cash in his safe deposit box, can the prosecution ignore and disregard such fact and procure a conviction on evidence that does not take such fact into consideration?

(c) Where the prosecution is for two consecutive years, does not the failure to prove to a reasonable certainty the opening net worth for the first year vitiate all computations for the second year?

(d) Where the evidence established an over-all amount of unreported income for the two year period, but does not furnish any basis for allotting any portion thereof to each year involved, can the conviction for both years be upheld on such proof?

(e) Where the accused claims that $20,000 of Government bonds found in his possession were the property of his mother and the prosecution introduces uncontradicted evidence of such fact, is not the prosecution bound by such evidence?

(f) Where the accused testifies in his own behalf and the Appellate Court holds his testimony was unworthy of belief, can the lack of accused's credibility be used to supply deficiencies in the prosecution's case?

(g) Where the evidence established that the accused had cash on hand shortly before the opening net worth period amounting to many thousands of dollars and there is no evidence showing that this cash was expended before the opening period, does not the opening net worth have to be credited with such amount?

(h) Does not the burden of proof at all times rest with the prosecution or is the accused required to prove his innocence?

## STATUTE INVOLVED.

26 U.S.C. sec. 145(b), Internal Revenue Code, sec. 145(b), as in effect prior to the Internal Revenue Code of 1954, reads:

> "Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade any tax imposed by this chapter or the payment thereof, shall, in addition to the other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with costs of prosecution."

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## STATEMENT OF THE CASE.[1]

The basis of jurisdiction in the Court of first instance (U.S. District Court, Northern District of California) is found in the filing of the indictment (R. 3) and 18 U.S.C. sec. 1291.

### 1. General nature of the case, the theory on which it was tried and the main and secondary issues involved.

The indictment charged appellant in four counts with the filing of false and fraudulent income tax returns for

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[1]Nine copies of the record as printed for the court below have been filed herewith with the Clerk of this Court.

himself and wife, computed on a community property basis, for the calendar years 1945 and 1946. Counts 1 and 2 refer to the year 1945 while Counts 3 and 4 refer to the year 1946. (R. 3.)

The Government relied on the "net worth method" of proof and had to establish with "reasonable certainty" appellant's net worth as of December 31, 1944, December 31, 1945 and December 31, 1946. (*Holland v. United States,* 348 U.S. 121, 99 L. ed. 150.)

Prior to the final trial of this case the parties entered into a written stipulation as to the assets and liabilities of appellant and his wife at the close of the years 1944, 1945 and 1946. Prior to the second and present trial an amended stipulation was entered into. Both stipulations were introduced in evidence as U.S. Exhibits 11 and 11a. (R. 129-141.)

These stipulations provided that neither party was precluded from offering evidence of any character bearing on or related to wilfulness or lack of wilfulness, or evidence relating to items of assets, liabilities or expenditures of appellant or his wife not included in the stipulations; that each party shall have the right to offer evidence as to the ownership or source of the funds with which U.S. Bonds were purchased and that the stipulations should not be construed as shifting the burden of proof to defendant or relieving the prosecution from proving the charges in the manner provided by law.

The computations of the Government were incorporated in a series of tables admitted in evidence as U.S. Exhibit No. 50 (R. 412) set forth in the Appendix at page xx.

With certain exceptions the Government's computations as to assets are based on the foregoing stipulations.[2]

The stipulations reserved to each party the right to introduce evidence as to further assets or liabilities and as to the ownership of any such assets or liabilities.

*The main issue involved* was whether the prosecution established to a reasonable certainty the opening and closing net worth of appellant. Included in this issue are:

(a) The amount of cash appellant had in his safe deposit boxes at the close of the years 1944, 1945 and 1946.

(b) Whether among the bonds in the possession of appellant at the end of 1945, $20,000 thereof were the property of and purchased by appellant's mother.

(c) Whether appellant was entitled to be credited with an additional $20,550 at the end of 1944 as the value of certain so-called Goodman sailor suits either on hand at that time or the proceeds of the sale thereof.[3]

So far as practical, we will confine our resume of the evidence to the foregoing points.

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[2]The only items of assets in the computations *not included* in the stipulations are: In 1944 the sum of $50,000 cash in safe deposit box; in 1945, $7200 cash in safe deposit box, cashiers check for $7724, $125.49 paid to Geo. Belling; in 1946, $10,000 for stock in and as a loan to Asturias Corporation, and $4335.04 expenditures to various shops.

[3]The trial judge instructed the jury that these three items were, in his opinion, of critical importance (R. 928), and the appellate court so held on the prior appeal. (210 F. 2d 795.)

**2. Evidence and the Court's instructions as to the cash on hand at the opening net worth period, December 31, 1944 and December 31, 1945.**

Olender contended at both his first and second trials that he had $75,000 in cash in his safe deposit box on December 31, 1944. The Government contended he only had $50,000 in cash on this date.[4]

The Government introduced in evidence as U.S. Exhibit 10, a net worth statement of Olender, prepared by accountant Ringo, showing "cash in vault" as of December 31, 1941, $75,000 and nothing as of December 31, 1947. This statement does not set forth anything for the intervening years. (R. 109, 233.)

CHARLES R. RINGO, certified public accountant, *called by the Government,* testified in substance:

In February, 1948, Olender told me the Government wanted a net worth statement. Mr. Root of the Internal Revenue Department told me the Government wanted a statement made up by years. I abandoned this idea because it was impossible to work it out by years. (R. 146-7.) I asked Olender to bring me an estimate of his net worth at the end of each year. (R. 147.) Olender gave me estimates of his assets and liabilities for each of the years from January 1, 1942 to 1948. (R. 149, 158.) U.S. Exhibit 19 is my summary of the estimates given by Olender. (R. 163.) The figures under "cash in vault"

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[4]As hereafter pointed out, the trial judge ruled and so instructed the jury that this figure of $50,000 could not be used for any purpose although the jury could use Olender's testimony as to how much cash he had on hand. The judge made the same ruling as to the sum of $7200 the government claimed as being the only amount of cash Olender had at the end of 1945.

were estimates given by Olender. (R. 165.) These figures show "cash in vault" as follows:

| | |
|---|---|
| December 31, 1942 | $75,000 |
| 1943 | $69,000 |
| 1944 | $50,000 |
| 1945 | $ 7,200 |
| 1946 | nil |

(R. 166.)

As for the $75,000 in the safe deposit box, an affidavit as to that amount was later prepared. It was a long story. (R. 160.) (Ringo testified as to Olender's statements as to how he acquired the $75,000. (R. 160-162.) I brought people in to confirm what Olender said as to his father being wealthy and having the sums available. (R. 162.) It was impossible for me to make a net worth statement for the years 1944-45-46. (R. 233.) I was able to make up one for the year ending 1941 because Olender had the affidavit as to the cash he had received from his father. (R. 233.) Olender told me his sources of income were from the Army & Navy Store, an interest in this property in Fresno, interest on Government bonds and dividends on stock. (R. 248.)

Between April and September, 1948, I had a discussion with Olender and Monroe Friedman relative to the fact that in April or May of 1944, there was a certain amount of money in Olender's safe deposit box. Monroe Friedman said there was over $70,000 in the box and Olender took a trip and the box was turned over to him. The records show that was in 1944. I think Monroe Friedman said he counted the money in April and May. (R. 257-259.)

MELBOURNE C. WHITESIDE, Internal Revenue Agent, *called by the Government,* first testified as to the preparation of the computations in U.S. Exhibit 50, and then testified:

I accepted from Ringo's papers the figure that Olender had only $50,000 in cash in the beginning of 1945. (R. 457.) I knew at the first trial that Olender was contending he had over $70,000 in cash in his safe deposit box in December 31, 1944. (R. 463.) I didn't make any additional investigation. I heard the affidavit of former Judge Monroe Friedman read at the first trial wherein he stated that as late as May, 1944, he knew there was over $70,000 in that box. (R. 463.) It wasn't necessary to do anything to verify or disprove that statement as May of 1944 was not a date that was material. We wanted to know how much cash he had on hand as of December 31, 1944. We used the taxpayer's estimate rather than Mr. Friedman's estimate as of May 1944. (R. 464.)

We had the books of Olender and the transcripts of his bank accounts and a great number of his checks for examination. We had the bank records to show what withdrawals had been made. We had cashier's checks payable to Goodman for $20,550. I knew they had been purchased with cash; that some of the bonds were purchased with cashier's checks, and that those cashier's checks were purchased with cash. We had records of large cash transactions, some of which ran as high as 5, 10 and $15,000 and we checked to see that this cash didn't come out of his bank accounts. (R. 466-7.) We didn't compute the amount of cash expenditures that didn't come out of Olender's bank account. (R. 468.)

SETH L. ROOT, Internal Revenue Agent, *called by the Government,* testified:

When Olender's net worth statement (U.S. Exhibit 10) was filed with the department on September 13, 1948, there were certain affidavits attached (R. 494); one was an affidavit of Monroe Friedman.

(It was stipulated that the document marked as Defendant's Ex. "G" was the affidavit of Monroe Friedman that was so attached to the net worth statement. [R. 881.] This affidavit was substantially the same as the testimony of Monroe Friedman at the trial and which is now set forth.)

MONROE FRIEDMAN, called by the defense, testified:

I have been at attorney-at-law since 1920 with the exception of about 13 months during which I was United States District Judge for the Northern District of California. I have known the defendant about forty years and have acted as his attorney. In April, 1944, Olender came to see me at my office and stated that he and his family were going to Texas later that month; that he had a son in the Armed Services who was stationed in Texas; that he would be gone a few weeks or a few months and while there he was going to look around to see if he could open up some store down there; that while he was gone he would like to have someone in Oakland who he could trust who would have access to his safe deposit box. (R. 499.) A couple of weeks later he called up and said he was leaving for Texas and would I meet him at the Bank of America, 12th & Broadway, because he wanted my name to go on his box. We both went to the bank together and we both went in. I believe the box had been

in the name of Olender and his wife and some cards were presented so that it would then be in the name of Mr. Olender and myself and he gave me the key. (R. 500.)

Defendant's Exhibit "F" dated April 22, 1944 contains my signature. (R. 501.)

(Exhibit "F" is the record of the Bank of America in Oakland and refers to safe deposit box 56 and contains the signatures of Olender, Milton and Friedman, Monroe.)

On May 5, 1944 the box was surrendered and transferred to a single card. (R. 501.) On April 22nd Olender opened the box and I saw currency in it. Olender counted the currency in my presence. (R. 502.) There was over $70,000, two or three hundred dollars more than $70,000. On May 5th, 1944 I met Olender at the bank. My name went off the box and I gave him back the key. From April 22nd to May 5th, 1944 I hadn't entered the box at any time. (R. 503.)

The document shown me is a duplicate original containing my signature that was sworn to on September 13, 1948. Olender came to me in 1948, stated the Internal Revenue Department was asking him some questions and he discussed with me as to the fact that this money was in his box four years before and asked if I would make a statement concerning what I personally knew so I drew up this statement (affidavit) as to what was my recollection in 1948 as to what had happened four years before. (R. 504.)

(The affidavit testified to by the witness was marked Defendant's Exhibit "G" for identification and subsequently admitted in evidence. [R. 881.])

MILTON OLENDER, the defendant, testified in substance the same as Monroe Friedman relative to the safe deposit transaction in April and May of 1944. (R. 569-573.) In addition he testified: that there was $75,000 in the safe deposit box (R. 571); that just before he and Monroe Friedman counted the money in the box that he had withdrawn 5 or $10,000 to take with him to Texas to buy the stock in a store there, that the purchase was not made and when he returned to Oakland he put the money back in the safe deposit box. (R. 571-2.)

THE COURT'S INSTRUCTIONS. At the conclusion of the case the trial judge instructed the jury as follows:

> "In many net worth cases the government relies on the taxpayer's statements made during the course of a governmental investigation in order to establish vital links in the government's case. Sometimes these statements are made by a taxpayer more concerned with a quick settlement than an honest search for the truth. In order to safeguard the defendant, the law requires that these statements relating to vital links in the government's case can be corroborated. *In this connection, the $50,000 cash item and the $7200 cash item used by the government in Exhibit 50 cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath.*" (R. 927.) (Italics added.)

The prosecutor took an exception to the foregoing instruction of the Court and appellant's attorney called the

Court's attention to what he considered a conflict in the instructions. (R. 942-3.) Whereupon the Court called the jury back and instructed them as follows:

> "The Court. It has been called to my attention, ladies and gentlemen, that perhaps there is some confusion from a statement I made. I asked you not to draw any inference against either side because of rulings that I made throughout the trial. I was referring to the rulings I made with regard to the admission or exclusion of evidence. *I didn't mean that you should disregard any statement to you that you cannot consider the $50,000 or the $7200 item in that Exhibit 50. I mean that you cannot consider it.* So don't disregard that ruling. The rulings that I had reference to were the rulings made throughout the trial during the ordinary objections by the government or by defendant's counsel to rulings on evidence." (R. 943.) (Italics added.)

**3. Evidence relating to the ownership of $20,000 worth of Government Bonds.**

The stipulations listed Olender and his wife with having $82,000 worth of Government bonds in their possession at the end of 1945. The prosecution used this figure as part of Olender's assets in figuring his net worth at the end of 1945. (U.S. Ex. 50.)

The evidence conclusively proved that $20,000 of these bonds belonged to Olender's mother, Mrs. Mollie Olender.

MELBOURNE C. WHITESIDE, a Government agent called by the prosecution, testified:

There are $82,000 of Treasury Bonds listed. Included in this figure for 1945 and in the itemization of bonds for

1946 there are $20,000 of bonds which Olender contends belonged to his mother. (R. 450.) I first acquired knowledge that Olender claimed that those bonds were neither his nor his wife's from the net worth statement submitted to Mr. Root which I saw in October, 1948. (R. 450.) Prior to that time I had no such knowledge. Ralph R. Read was a former Special Agent. Subsequently I found some correspondence between Mr. Read and Mr. Olender. This was either in 1948 or early in 1949. (R. 451.) I made an investigation relative to who owned those bonds. They were purchased on December 5, 1945 with two cashier's checks which previously had been purchased with cash. The checks were for $10,000 and $15,000. (R. 452.)

U.S. Exhibit 35 for identification, I have seen the originals of those. They were attached to a letter sent in by Mr. Olender in 1946. (R. 453.) With reference to these $20,000 of bonds we tried to check whether there was any transfer of funds from the Fresno bank account which may have been sent to Olender for the purpose of buying these bonds. The only information other than Ringo's inventory of the safe deposit box that we had that these bonds belonged to Molly Olender was that which Mr. Olender submitted to us. I know that Olender's mother died prior to the first trial. I did not make any investigation of the probate of her estate to determine whether or not those bonds were ever listed in her estate. After the last trial we did check to see what was listed in the estate and the original return filed for the estate did not include these $20,000 in bonds. (R. 455.)

(Stipulated that Mrs. Molly Olender died June 1st or 2nd, 1951.) (R. 457.)

The only other investigation we made prior to this trial as to the ownership of these bonds was to ask the bank for information of the sale and we were unable to get the transaction from the bank. (R. 459.)

As to the correspondence between Mr. Read and Mr. Olender I have two letters, one addressed to the Army & Navy Store and the other to Mr. Olender on August 16, 1946 and a reply.

(The three letters were marked as Defendant's Exhibit "D" for identification.) (R. 476.)

The two documents you now show me are the originals of the photostats now constituting U.S. Exhibit 35 and they were attached to the letter now included in Defendant's Exhibit "D" for identification. (The two original documents were then made part of Defendant's Exhibit "D" for identification and marked D-1.) (R. 478.)

I found the Estate Tax Return. It is in the inventory that was filed in the Molly Olender estate itself. (R. 479.) On page 5 of the Federal Estate Tax Return there are some notations written in pencil which read "U.S. Government Bonds 20m".

The Federal Estate Tax Return was filed with the Treasury Department on December 15, 1952 after the first trial of this case. It is signed by Terry Olender Gamborg Glick, a sister of the defendant. (R. 487.) (The Federal Estate Tax Return was introduced in evidence as U.S. Exhibit 52. (R. 489.) Under Schedule "G", transfers during decedent's life, there appears the following: "If there were any other transfers made Terry Olender Gamborg does not have a record or knowledge of them". (R. 490.))

Relative to U.S. Exhibit 52 the Federal Estate Tax Return, from the time it was filed it remained in the custody of the Government. (R. 492.)

CHARLES R. RINGO, the accountant called by the prosecution, testified:

The document you show me is a photographic copy of the inventory I made of the contents of the safe deposit box on May 5, 1948. Safe deposit box 56, Bank of America, 12th & Broadway. (R. 169.) On the inventory I have the type of bond, the serial number of the bonds and the certificate number of the stock certificates. (R. 169.) I procured from the Bank of America the record that Olender had box 56 and box 44 which was in the name of Molly or Milton H. Olender and was opened August 18, 1944. (R. 170.) (Photostat of inventory admitted in evidence as U.S. Exhibit No. 20.) (R. 171.)

U.S. Exhibit No. 20 is the inventory I took of the safe deposit box and contains on page 2 the heading "bonds being held for mother" and itemizes the bonds as follows: 2¼% Treasury Bonds Nos. 1906F, $5,000; 1907H, $5,000; 1908J, $5,000; 1909K, $5,000. I took those numbers off the bonds. (R. 228.) I learned that the bonds were his mother's from what I saw at the safe deposit box. Just what that was I don't have on the inventory. (R. 229.) These bonds totalling $20,000 had some marking showing that they were the mother's bonds. There evidently was something in the box that identified those bonds as the bonds of Mr. Olender's mother. (R. 230.)

*Questions by the Court.* When I took an inventory of the safe deposit box *I believe the bonds were in an en-*

*velope* or in some other form identifying them as a group. There was something on the bonds that would indicate they were the bonds of Olender's mother. (R. 202-3.)[5]

MILTON OLENDER, the defendant, testified in substance as follows:

During 1944 I took care of all of the affairs that my mother and I were jointly interested in. There was a safe deposit box in the Bank of America, Oakland in my mother's name and my name that was used to deposit the documents and papers relating to these joint affairs. The box number was 44. (R. 553.) In 1944 my mother brought some money up with her and asked me to put it in that box. I believe it was $10,000. My mother resided in Fresno and she came to Oakland very often. She brought the money up in currency. Either at the end of 1944 or early in 1945 she brought up another $10,000 making $20,000 in the safe deposit box. (R. 554.) Defendant's Exhibit D-1 is a receipt I received from the Bank of America for the purchase of $25,000 of 2¼ 59-62 bearer bonds dated December 5, 1945. $20,000 of that money was my mother's and $5000 was mine. I received those bonds and put them in one of the two safe deposit boxes. (R. 555.) I put $5000 of the bonds in my own safe deposit box and the other $20,000 I placed in an envelope on which I wrote "The property of Mrs. J. Olender" and the numbers of each of the bonds. On May 5, 1948 Mr. Ringo went to the safe deposit box and that envelope was

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[5]The opinion emphasizes Olender's failure to produce this envelope; but the government witness testified there was such an envelope in which were the bonds.

in the box with the bonds in it. (Defendant's Exhibit D-1 admitted in evidence.) (R. 556.) I bought two cashier's checks totalling $25,000 and presented them to the person who gave me this receipt. I bought the cashier's checks with cash out of my safe deposit box. $5000 of it was mine, the other $20,000 was my mother's. (R. 557.) The documents you hand me (Defendant's Exhibit "D" for identification) are the communications and queries from the Government and my reply thereto relative to the purchase of these bonds. (Documents admitted in evidence.) (R. 558.)

The first of these documents is dated August 16, 1946 on the letterhead of the Treasury Department signed by Ralph R. Read and addressed to defendant. It asks for an explanation of a currency transaction in the amount of $25,000 on November 9, 1945 and also one for $25,000 on November 20, 1945. The second letter in the Exhibit is in the same form; is addressed to the Army & Navy store signed by Ralph R. Read and asked for the explanation of a currency transaction involving $25,000 on or about December 5, 1945. These letters are set forth in full in the record at pages 559 and 560. The third letter is dated August 23, 1946 written by Milton Olender to Ralph R. Read in response to the two foregoing letters. It is set forth in full in the record from pages 560 to 562 and states in part as follows:

> "The $25,000 transaction on December 5th, 1945, represents the purchase of U.S. Treasury Bonds as per enclosed receipt. The bonds were purchased for the account of my mother, Mrs. Olender, a resident of Fresno, California, in the amount of $20,000 on written instructions from her, which I have in my

records. This cash was taken out of our joint safe deposit box and was part of the proceeds of the estate left to my mother by my father, which is of record. My records, which substantiate the above information, are available for your inspection."

The authority for the purchase of $20,000 worth of bonds for my mother I received in a letter from my mother dated November 23, 1945 (Defendant's Exhibit "N" (R. 563)) and reads in part as follows:

"If you have no further need of the cash in the box, I prefer that you put it into government bonds and not into stocks, as you know only too well Dad's experience with stocks. If you do buy the bonds, put them in our box for safe keeping."

Following the purchase of these bonds I received an acknowledgment from my mother dated December 14, 1945. (Defendant's Exhibit "O".) (R. 565.) This letter reads in part as follows:

"I have been forgetting to mention those bonds you bought for me last week. When you get them, keep them up there for me; as I wrote you previously before, I still prefer that you put your money into government bonds instead of stocks. I realize the Bank of America dividends are higher and what you say about them is true. When you make your next payment to me, I may let you convince me, but I still think the bonds are the safest investment."

I kept those $20,000 worth of bonds of my mother's until they were sold in 1953. (R. 565.) The bonds were sold by the Bank of America on my order and as a result I received this check (Defendant's Exhibit "I"), payable

to the estate of Molly Olender for $18,959.40. It is endorsed for deposit only, estate of Molly Olender by Terrys Olender Gamborg, Milton Howard Olender, co-ex. The check was deposited in the Bank of America, Fresno, in the account of the estate of Molly Olender. (R. 565-6.)

(There was then admitted in evidence as Defendant's Exhibit "P" Supplementary Inventory filed in the estate of Molly Olender on March 30, 1953 by Milton Olender. On p. 3 thereof it lists as assets of the estate $20,000 worth of U.S. bearer bonds numbered 1906F, 1907H, 1908V (sic) and 1909K, each in the principal sum of $5000.) (R. 567.)

The bonds purchased for my mother were coupon bearing bonds, interest payable semi-annually. I clipped the coupons and usually deposited the proceeds in my personal account and thereafter I either gave my mother the cash but generally I mailed her a check for her share of the dividends.

In 1947 my mother gave me the interest on her bonds and I reported it in my 1947 income tax. In the other years 1946, '48, '49, '50 and '51 that income was reported in my mother's income tax returns. (R. 569.)

C. F. CARROLL, of the Bank of America, testified:

I have brought records of the bank showing the sale of bonds for the Estate of Molly Olender in July 1953. (R. 517.)

(Defendant's Ex. "H", the order to sell securities is dated July 13, 1953 and lists the securities as 4 $5000 T.B. 2¼% bonds numbered 1906F, 1907H, 1908J and 1909K. (R. 518.))

The bonds were sold and a cashier's check was issued by the bank. (Def. Ex. "I" is check payable to order of estate of Molly Olender for $18,959.40 and is endorsed "for deposit only, estate of Molly Olender by Harry (sic) Olender Gamborg, Milton Olender, co-ex. (R. 520.))

**4. Evidence relating to the purchase of $20,550 worth of sailor suits from George Goodman.**

Olender contended that his opening net worth should be credited with the sum of $20,550 for the purchase of sailor suits in 1944, which were not included in his inventory and which he did not sell until 1945-46.

The Government established that in January, 1944, Olender purchased 6 cashier's checks totalling $20,550, each payable to George Goodman; the applications for the checks were signed by Milton Olender. (R. 52-53.) Olender at all times admitted his signatures on the applications.

No evidence was introduced showing the sale or disposal of any of these suits in 1944.

The evidence relating to these suits was given by Olender, Louis Levy and Morris Lerman, defense witnesses.

OLENDER testified that cashier's checks (U.S. Exhibit 6) totalling $20,550 were made out at the request of Louis Levy payable to George Goodman (R. 588); that on a trip to New York Levy thought he could purchase some sailor suits; that when in New York, Levy communicated with him to send on these checks (R. 587); that as a result he received 822 sailor suits from the Seagoing Uni-

form Company and that when he opened the suits he found they were mismarked as the suits were all larger in size than the markings thereon (R. 589); that as his dealings were with Levy, he complained to Levy about the mismarkings of the suits (R. 590); that the suits were all large sizes and only small size sailor suits were in demand; that he had no way of cutting down these large size sailor suits (R. 588); that he put the suits in his basement where they remained over a year and Levy said he would try to sell some of them for him (R. 591); that as he had paid cash for these suits out of his safe deposit box, he didn't put any entry in the books of the Army and Navy Store of this expenditure of $20,550 and he didn't include the suits in his inventory at the end of 1944 because the transaction was indefinite and uncertain (R. 594); that in 1945 Levy sold 200 of these suits for him at cost, to-wit, $5000 (R. 592) and that he deposited this amount in the store's bank account and entered it in the books as a capital investment (R. 594); that later in 1945 Levy sold 280 more of these suits for $7000 (R. 595); that he hadn't included the 822 suits in 1944 inventory as he didn't know what was going to happen to them and because he hadn't made any entry of their purchase. (R. 597.)

MORRIS LERMAN testified that in 1945 he purchased 200 suits from Louis Levy for $5000 (R. 525); that he received the sailor suits and they were mismarked; that they were larger than marked; that in 1945 he had tailors in his establishment who could make alterations (R. 528); that when he found the sailor suits were mismarked he notified Mr. Levy thereof. (R. 537, 545.)

That he paid Levy with 2 cashier's checks of $2500 each. (R. 526-9; Defendant's Exs. "K" and "L".) Each of these checks is payable to L. Levy, is endorsed by Levy and then by Army & Navy Store, per M. Olender. (R. 529-30.)

LOUIS LEVY testified that he negotiated the purchase of these sailor suits from George Goodman for Olender (R. 850); that after he returned from New York, Olender complained that the suits were not properly marked and that he was having trouble; that he wrote to Goodman regarding the sizes and never got a reply (R. 851); that subsequently he sold 200 of these suits to Lerman at $25 each and subsequently sold $7000 worth for Olender. (R. 852.)

Olender further testified that he sold none of the Goodman suits during 1944 (R. 758); that in 1945 he included 322 of these suits, this being the difference between the 822 purchased and the suits sold by Levy, in his inventory at the end of that year. (R. 597.)

The prosecution's evidence on this matter is as follows:

MEDBURY BLANCHARD, of the Internal Revenue Bureau, testified: that in 1947 he interviewed Olender relative to the Goodman checks, that Olender said he had done business with Goodman but did not know how much (R. 46-7); that a few days later Olender showed him a cancelled check made payable to Goodman for $1380, that he had been sending money east to get suits but this was the only transaction apparently completed with Goodman (R. 52); that later he took a question and answer statement from Olender;

(The statement was read into evidence (R. 83-92) and in this statement Olender's answers were as follows: the signatures on the applications are mine (R. 89); the check to Goodman for $1380 is the only completed transaction I have a record of (R. 90); as to the other Goodman checks, I have no recollection of them whatever. (R. 91.)).

CHARLES R. RINGO, the accountant, testified that he could not find any record in the books relative to the Goodman transaction (R. 152); that he talked to Olender on several occasions about the Goodman matter but he was never given a complete explanation of the Goodman transaction (R. 154) that Olender said he had so many transactions that he couldn't remember the particular transaction, that it was to be taken up with Monroe Friedman. (R. 155.)

SETH ROOT, Government agent, testified: that he asked Olender for an explanation of the Goodman transaction and that Olender said he was unable to recall it; that there was no record in Olender's books of the transaction. (R. 10.)

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## REASONS RELIED ON FOR ISSUANCE OF THE WRIT AND SUPPORTING ARGUMENT.

**(a) Summary of reasons relied upon.**

Based on the authorities hereinafter cited petitioner submits that the writ herein prayed for should issue for each of the following reasons:

1. The lower Court has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's supervision in each of the following

matters: (a) In relying on evidence stricken out by the trial judge to support the affirmance of the judgment; (b) in holding that the lack of credibility of petitioner could supply deficiencies in the prosecution's case and justify a verdict of guilty; (c) in requiring the petitioner to prove his innocence by shifting the burden of proof from the prosecution to petitioner.

2. The lower Court, in holding the evidence to be legally sufficient to establish the opening and closing net worths of petitioner, has rendered a decision in conflict with applicable decisions of this Court, and in conflict with decisions rendered by Courts of Appeal in the Second, Fifth, Sixth and Seventh Circuits.

3. The lower Court has misconstrued and misapplied the decision of this Court in the case of *Calderon v. United States,* 348 U.S. 160.

**(b) The lower Court's opinion, holding the opening and closing net worths were legally established, is in conflict with decisions of this Court and other Courts of Appeals.**

The opinion, without referring to any facts or figures, holds that the Government established the opening and closing net worth of petitioner.

First, the opinion states that according to the Government's computations the petitioner and his wife should have reported net taxable income of $87,999.24 instead of $41,067.61 for 1945 and $43,212 instead of $23,514.62 for 1946. These figures are taken from U.S. Ex. 50 and are based on $50,000 cash on January 1, 1945 and $7200 cash on January 1, 1946, *amounts which the trial judge ruled out of the record* (R. 927, 943) and instructed that they

could not be used for any purpose. Thus, unless Olender's testimony be believed, there is no evidence in the record of any amount of cash on hand on such dates.

The lower Court admits that the burden was on the Government to prove the opening and closing net worths with "reasonable certainty". (*Holland v. United States*, 348 U.S. 121.)

The lower Court concedes that Olender's testimony of $70,000 plus in cash in safe deposit box in May, 1944, was duly corroborated. (R. 971, Appendix p. v.) The Government never disputed this fact.

Eliminating Olender's testimony, the amount of cash Olender had in his safe deposit box remains in the realm of surmise and conjecture, leaving the net worths indefinite and uncertain and without any proof to a reasonable certainty or any certainty at all. Neither the Government, the jury nor the lower Court can indulge in guesses, surmise or speculation as to the amount constituting an accused's net worth. As said in *Thomas v. Commissioner*, (1 Cir.) 232 F. 2d 520:

> "If respondent is permitted to make an arbitrary guess as to the proper figure for the cash on hand, there would seem to be no reason as a general proposition why similar guesses should not be made as to each of the constituent elements comprising the taxpayer's net worth. Under these circumstances the entire net worth technique becomes nothing but an elaborate accounting sham lending a semblance of system and logic to a determination of deficiency which could have no greater validity than the original guesswork upon which it was based."

The lower Court, after stating that Olender's testimony as to $70,000 cash in May 1944 had been corroborated, then states:

> "This corroborated evidence raised the preliminary question of the worth of United States Exhibit 10—the final product of appellant's accountant's efforts to establish valid net worth statements—and the subsequent question as to whether or not the government's evidence had been corroborated." (R. 971, Appendix p. v.)

Manifestly, a non-existent fact cannot be corroborated. As the trial judge correctly struck out the Government's figures of $50,000 and $7200, there was no admission in the record in this regard that could be corroborated. Furthermore, U.S. Ex. 10—the net worth statement—contained no figures for the years 1944, 1945 or 1946. (R. 109, 233.)

The record is thus left in the following situations: (1) There was a substantial but undetermined amount of cash in Olender's possession on December 31, 1944; or (2) Olender's corroborated testimony that he had more than $70,000 must be accepted as true.

If the first of the foregoing results is adopted then the opening net worth was never legally established and all computations for the indictment years must fall.

> "The prosecution's proof started with a supposed 'net worth' at the beginning of the year 1946, made up of four items which, less liabilities, aggregate $250,000, and among them is no item of cash on hand. *Concedely the 'net worth' at the beginning of each year would be falsified to the extent that any such*

*sum was omitted; and with it would fall the computations for later years.''* (Italics added.)

*Costello v. United States,* (2 Cir.) 221 F. 2d 668.

If the second result is adopted, then Olender's opening net worth must be credited with $70,000 plus.

Olender testified that his only sources of income were from the Army and Navy Store; his properties in Fresno; dividends and interest on stocks and bonds and gifts and that all expenditures made by him were either out of the store bank accounts, his personal bank accounts or out of cash in his safe deposit box. (R. 550, 551.)

Revenue Agent Whiteside testified that the Government had records of large cash transactions running as high as $5,000, $10,000 and $15,000 and that a check showed that this cash did not come out of appellant's bank accounts (R. 467); that they found records of bonds having been purchased with cashier's checks and that the cashier's checks had been purchased with cash (R. 466-7); that the Government had not made any computation or investigation to determine how much cash expenditures had been made by Olender as distinguished from expenditures by check on his various bank accounts. (R. 467-8.)

The record shows, among other cash expenditures, that in 1945 Olender opened three trustee accounts for his children in the sum of $15,000 cash. (Testimony of Olender, R. 626; Defendant's Ex. "AA"; U.S. Ex. 10 and Defendant's Ex. "D", R. 561); that $5,000 cash was expended for United States Treasury Bonds (Defendant's Ex. "D", R. 561; U.S. Ex. 10); that $10,000 in cash was deposited to Olender's personal bank account (Defendant's Exs. "W" and "D").

The stipulation (U.S. Ex. 11) shows that at the end of 1944 appellant and his wife had $24,000 worth of United States Treasury Bonds; that at the end of 1945 this sum had been increased to $82,000, an increase of $58,000; deducting from this the $20,000 of bonds claimed to belong to defendant's mother it leaves an increase of $38,000 for the purchase of bonds. Thus, we find large cash expenditures in 1945 far in excess of the $50,000 the Government unsuccessfully sought to rely upon that could only have come out of the cash in Olender's safe deposit box.

Thus Olender had a substantial amount of cash at the end of 1944. This was either the amount as testified to by Olender or an undetermined amount which would render the computations of the Government erroneous and the proof insufficient.

On all fours is the case decided in the Fifth Circuit based upon the rulings in the *Holland* case and the companion cases decided by the Supreme Court.

In *Vloutis v. United States* (5 Cir.) 219 F. 2d 782, the Government relied on the net worth method of proof to establish income tax evasion for the years 1944 and 1945. Involved was the question of how much cash the defendant had on hand at the opening net worth period.

The defendant had testified that he had $40,000 at the end of 1941. Roussell, the Government agent testified that he had no such money.

The Court at p. 782 states the testimony of the Government agent as follows:

> "Under vigorous cross-examination, he admitted he did not know how much cash appellant had at the

beginning of the prosecution period, but stated he had not shown any cash because he had no evidence to reveal any and didn't believe appellant had any. He went further to say that appellant had told the investigators of $40,000 cash as of December 31, 1941, and even if there had been such a fund, it would have been spent for the assets acquired up to December 31, 1943 (the beginning date)."

(Such was the stand of the Government herein. Internal Revenue Agent Whiteside testified: I knew at the last trial (September 1952) that Olender was contending that he had over $70,000 in cash in his safe deposit box as of December 31, 1944. (R. 463.) I heard the affidavit of former Judge Monroe Friedman read at the first trial of this case wherein he stated that as late as May, 1944 he knew there was over $70,000 in that box. (R. 463.) It wasn't necessary to do anything to verify or disprove that statement *as May of 1944 was not a date that was material. We wanted to know how much cash he had on hand as of December 31, 1944.*)

At p. 793 the Court states part of the evidence relating to Vloutis' cash expenditures thus:

"Here, however, there is serious doubt that the point can be so easily resolved. It should be noted that the investigators never did ask appellant how much cash he had on December 31, 1943. The Government's own evidence showed the following purchases or transactions by appellant: November 15, 1943, bonds in the amount of $5,571.25; December 14, 1943, bonds in the amount of $5,000.00; January 1, 1944 (the very first day of the prosecution period), bonds in the amount of $5,610.92; January 10, 1944, loan to a friend of $3,000.00; during the month of January,

> 1944, United States bonds in the amount of $3,825.00; February 15, 1944, stock in the amount of $1,800.00; April 13, 1944, bonds in the amount of $6,152.30. The records of the investment company (which the Government examined) and the testimony of one of its brokers (whom the Government interviewed) showed that of the amounts listed, totaling $30,959.48, *at least $23,291.48 was paid in cash.* The investment broker further testified that in December, 1943, and again early in 1944, he went with appellant to the latter's bank box; that he saw therein several large brown envelopes; that appellant opened two envelopes on each occasion and extracted cash with which to buy stocks or bonds." (Court's italics.)

The Court held the foregoing disclosed a substantial amount of cash on hand at the opening net worth date.

In the instant case we find, as was set forth in the *Vloutis* case, large cash expenditures, an independent and credible witness testifying that he went to the safe deposit box in May of 1944 wherein there was over $70,000 in cash.

In *United States v. Costello* (2 Cir.) 221 F. 2d 668 (also decided after the *Holland* case), the Government was also relying on the net worth method of proof.

On p. 672 the Court states that "the issue is narrowed to whether Costello had an accumulated cash reserve at the beginning of 1946 out of which the purchases might have come that were shown to have been made, and not declared".

Costello was charged with evading income taxes for the years 1946, 1947, 1948 and 1949. The opening net worth

would be January 1, 1946. The jury found Costello not guilty for the year 1946. The Appellate Court reversed as to the year 1947 on the ground that the evidence did not establish the charge based upon the assumption that on January 1, 1946 Costello did not have a cash reserve of more than $30,000 (p. 673).

The Government contended that on January 1, 1946 Costello had no cash reserve whatever. Costello contended to the contrary. A net worth statement dated October 18, 1937 was made by Costello to the Tax Bureau in which he stated that on that day he had a cash reserve of between $25,000 and $30,000.

On pp. 672-3 the Court points out the various computations covering the indictment years and reversed the conviction on the second count of the indictment (1947), stating as follows:

> "In deference to the limitations imposed upon any use of the 'net worth' method, we feel obliged to say that the evidence did not justify a verdict based upon the assumption that on January 1, 1946, there had not been a reserve of more than $30,000; or indeed of more than $40,000."

There being proof both by the Government and defense that at the end of 1944 Olender had a large but undetermined amount of cash on hand, the computations of the Government omitting the amount of such cash must fall and the opening net worth was never established, and with it falls the closing net worth.

> "We agree with petitioner that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to

serve as a starting point from which to calculate future increases in the taxpayer's assets. *The importance of accuracy in this figure is immediately apparent, as the correctness of the result depends entirely upon the inclusion in this sum of all assets on hand at the outset.*" (Italics added.)

*Holland v. United States,* 348 U.S. 121, 132.

See, also, the earlier cases of *Fenwick v. United States* (7 Cir.) 177 F. 2d 488, 491; *Bryan v. United States* (5 Cir.) 175 F. 2d 223, 225; *Brodella v. United States* (6 Cir.) 184 F. 2d 823.

**(c) The lower Court erroneously relied on evidence stricken from the record.**

The opinion (R. 97, Appendix p. v) relies on Ringo's statement, contained in U.S. Ex. 19, that Olender had only $50,000 in cash at the end of 1944 and $7200 at the end of 1945 and states that these figures were not haphazardly arrived at as Ringo had gone over the net worth statement (U.S. Ex. 10) very much with Olender.

These amounts were stricken from the record by the trial judge and properly so as they had never been corroborated.

When the lower Court resorted to evidence not in the record to support the conviction, it was making a flagrant departure from the accepted and usual course of procedure in judicial proceedings.

The lower Court having struck out these figures and ruled that they could not be used for any purpose, the record was left with no such evidence therein, and the

lower Court could not resort to facts, admissions or figures not contained in the record.

**(d) The lower Court erroneously refused to credit the opening net worth with $20,550, the cost of the Goodman suits.**

The Government conclusively established that Olender expended $20,550 early in 1944 for suits purchased from George Goodman.

Olender testified that when these suits arrived they were mismarked as all were larger than the sizes ordered and which he could not sell as he had no tailors that could alter them; that he stored them in his basement and complained to Levy, who had procured these suits for him; that nothing was done and the suits remained in his basement until 1945-46. All this is corroborated by the testimony of both Lerman and Levy. (See supra pp. 21 to 23, where the testimony is fully set forth.

As these suits were purchased in 1944; were still in possession of Olender at the end of 1944, they must be included in his net worth at the end of 1944, thereby increasing his net worth by the cost thereof.

The lower Court concedes (R. 977, Appendix p. xii) that "if the trier of fact were to credit the appellant with the $20,500 in sailor suits, it should not again credit the $7,000 representing cash received through sale of some of these suits." This refers to the cashier's check of $7724 which the Government included in the net worth at the end of 1945.

**(e) The amount of cash on hand at the end of 1945 was substantial but undetermined.**

December 31, 1945 is the closing net worth date for the year 1945 and also the opening net worth date for the year 1946.

The opening net worth of Olender on December 31, 1944 was never established. As the closing net worth for that year depended on proof of the opening net worth, Olender's net worth as of December 31, 1945 was never established.

The Government could not rely on $7200 being the cash in safe deposit at the end of 1945 as this figure was stricken from the record. The evidence established that Olender must have had a substantial amount of cash on this date though the amount was undetermined.

There is no evidence in the record of any source of income in 1945 or 1946 other than as testified to by Olender, viz: From his Army & Navy Store, his property in Fresno, interest on bonds, dividends, etc., and that all expenditures not made by check on his bank accounts came out of the cash in his safe deposit box.

That there was a substantial amount of cash (over the $7200 relied on by the prosecution) is evidenced by the record. In 1946 cash deposits were made in Olender's bank accounts as follows: May 1st—$6000, December 4th—$2800, December 20th—$1500. (Def. Ex. "W", R. 623); in 1946 $5000 of Olender's cash was deposited in the Olender-McGreet bank account (Def. Ex. "AB", R. 628); on May 2—$1700 and on September 18—$2500 was deposited in the Olender-Elkus account. (Def. Ex. "V", R. 621.)

All these deposits in cash in 1946 are evidence of cash on hand at the end of 1945. (*Vloutis v. United States, supra.*) The foregoing figures exceed by almost $20,000 the $7200 on which the Government unsuccessfully sought to rely.

**(f) The Government erroneously included $20,000 worth of Government Bonds as being the property of appellant on December 31, 1945.**

The evidence as to the ownership of these Bonds is conclusive. Olender testified that at the end of 1944 or early in 1945 his mother brought up $20,000 of her money which was put in the safe deposit box (R. 554); that on December 5, 1945 he purchased with cash $25,000 worth of Government Bonds (Defendant's Exhibit D-1); that $20,000 was his mother's and $5000 was his (R. 555); that he placed $20,000 worth of the Bonds in an envelope on which he wrote: "The property of Mrs. J. Olender" and the numbers of each bond; that on May 5, 1948 accountant Ringo went to the safe deposit box and that envelope was in the box with the Bonds in it (R. 556); that on August 16, 1946 he received a letter from the Treasury Department asking for an explanation of certain currency transactions and he received a second letter asking for the transaction of $25,000 of December 5, 1945. These letters are set out in the record at pp. 559 and 560; that on August 23, 1946 Olender wrote to the Internal Revenue Agent wherein he stated that of the $25,000 transaction on December 5, 1945, $20,000 represented the purchase of Bonds for his mother on her written instructions. (The letter is set forth in full in the record at pp. 560 to 562); that on November 23, 1945 defendant received a letter from his mother (Defendant's Exhibit "N"),

reading in part that if he had no further need of the cash in the box she preferred that he put it in Government Bonds (R. 563); that on December 14, 1945 he received a letter from his mother (Defendant's Exhibit "O") stating that as to the Bonds he bought for her last week, he should keep them up there (in Oakland) for me (R. 565); that he kept the $20,000 worth of Bonds for his mother until they were sold in 1953 by the Bank of America for which a check was issued payable to the Estate of Molly Olender and was deposited in the Estate of Molly Olender, she having died in the meantime. (R. 565-6.)

CHARLES RINGO, the accountant, testified that on May 5, 1948 he made an inventory of Olender's safe deposit box (R. 221, U.S. Exhibit 20); that on this inventory he listed as "Bonds being held for mother" four $5000 U.S. Treasury Bonds giving the numbers thereof; that he took those numbers off the Bonds (R. 228); that he made the notation that the Bonds were being held for Olender's mother on something that he saw at the safe deposit box; that they had some markings showing they were the mother's Bonds, etc. (R. 202, 203, 229, 230.)

MR. CARROLL of the Bank of America testified that in July of 1943 the bank received an order to sell the same Bonds that were listed in Ringo's inventory by number signed "Estate of Molly Olender by Milton Olender" (Defendant's Exhibit "H", R. 518); that pursuant to said order the Bonds were sold and a cashier's check (Defendant's Exhibit "I") was issued payable to the order of the Estate of Molly Olender for $18,959.40. (R. 520.)

Defendant's Exhibit "P" is a supplementary inventory filed in the Estate of Molly Olender on March 30, 1953

by Milton Olender and on page 3 thereof lists as assets of the estate $20,000 worth of U.S. Bonds bearing the same numbers as those listed on the inventory made by Ringo.

Starting with the letters written by Olender's mother in November and December of 1945, followed by the information given to the Internal Revenue Department in August of 1946, the inventory taken by Ringo in May of 1948, the sale of the Bonds, the issuance of the check to the Estate of Olender's mother, the depositing of that amount in her estate and the listing of the Bonds as an asset of that estate, we find an unbroken line of evidence establishing that the $82,000 worth of Bonds relied on by the Government as property of Olender at the end of 1945 should be reduced by the sum of $20,000.

**(g) Computations and showing that there was no likely source from which the claimed increases could have sprung.**

Disregarding Olender's testimony as how much cash he had in his safe deposit box, we find that neither the opening or closing net worth of Olender for the indictment years was ever established to a reasonable certainty.

If Olender's testimony is adopted coupled with all other proof produced by both Olender and the Government, we find that there was no unreported income.

The lower Court relies on the rule that proof of a likely taxable source from which a jury can reasonably find that the net worth increases sprang, it (the Government) need not negative all possible non-taxable sources. (R. 977.)

There is absolutely no evidence in the record of any likely taxable source—either in 1945 or 1946—from which it could be inferred that any net worth increases sprang.

Olender and Ringo each testified as to the only sources of income Olender had. If the lower Court was referring to the suits that came to Olender from or through Goodman as the result of the $20,550 expenditure or the suits that came from the Seagoing Uniform Co. (Testimony of Sanchirico, R. 889) *each of these transactions took place early in 1944 and before the opening net worth period.* There is no evidence of any unrecorded purchases or sales thereafter. Besides, if these matters are to be considered then the cost thereof must be credited to the opening net worth at the end of 1944.

This Court in *Holland v. United States,* 348 U.S. 121, 138 states:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income."

While in *Smith v. United States,* 348 U.S. 147, 155, it is stated:

> "Without proof that assets on hand at the beginning of the prosecution period did not account for the alleged net worth increases, the Government could not succeed."

If Olender's testimony and that of the other witnesses is considered, we find that there was no unreported income and that petitioner's conviction was erroneously affirmed by the lower Court.

The Government contended (U.S. Ex. 50) that there was unreported net taxable income for the year 1945 in the

sum of $46,931.63, based on the use of the $50,000 and $7200 cash items which were ruled out by the trial Court.

As demonstrated above, $20,000 (the mother's Bonds) was erroneously included in the closing net worth. Also the sum of $7000 (the check) was erroneously included. Olender's testimony, corroborated in part by Monroe Friedman, shows that Olender had $70,000 plus on hand at the opening net worth date. Thus the Government's opening net worth figure must be increased by at least $20,000 and the closing net worth decreased by $27,000, leaving no unreported income for the year 1945. If there is added to the opening net worth the $20,550 paid for the Goodman suits then the computations show an overpayment of taxable income for the year 1945. As to 1946, the opening net worth never having been established, or the Government's computations being adjusted as above set forth, the conclusion is inevitable that the offense for this year was never established.

**(h) The lower Court erroneously held that the untruthfulness of Olender was sufficient to uphold the judgment and to supply deficiencies in the prosecution's case.**

Repeatedly through the opinion the lower Court stresses the fact that the entire case depends on the credibility of Olender and that his credibility was principally in issue. (R. 969-70.) The greater portion of the opinion is devoted to conclusions that Olender was unworthy of belief.

The burden of proving the charges was at all times on the prosecution, this burden never shifted to the defendant.

> "Although it may sound fair to say that the taxpayer can explain the 'bulge' in his net worth, he

> may be entirely honest and yet unable to recount his financial history. In addition, *such a rule would tend to shift the burden of proof.*" (Italics added.)
>
> *Holland v. United States,* 348 U.S. 121.

In *Thomas v. Commissioner, supra,* it is held

> "The burden upon the taxpayer is not to show the correct amount—but rather that the determination of respondent is without support."

The Government having the burden to prove guilt, deficiencies in the Government's proof cannot be supplied by the untruthfulness or lack of credibility of the accused. (cf. *Bihn v. United States,* 328 U.S. 633, 637; *Demetree v. United States,* (5 Cir.) 207 F. 2d 892; *Lurding v. United States,* (6 Cir.) 179 F. 2d 419, 422.)

The Government having failed to establish the opening and closing net worths of Olender, the absence of such vital proof cannot be disregarded merely because the lower Court believed Olender to lack credibility. The opinion can be construed in no other way than as holding that Olender had to prove his innocence.

**(i) The lower Court has misconstrued and misapplied the decision in Calderon v. United States, 358 U.S. 160.**

The opinion of the lower Court (R. 973-4) first held that the *Calderon* case did not require the prosecution to establish unreported income for each year involved and *misquoted* the decision as follows: "It might be argued that there must be evidence of a deficiency for *each* of the years here in issue. There is no merit in this contention." When petitioner called the Court's attention to this *misquotation* and quoted from this Court's decision in the *Holland* case as follows:

> "While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the approximate tax year the taxpayer may be convicted on counts of which he is innocent."

the lower Court, in denying a rehearing, corrected its first opinion by correctly quoting the *Calderon* case. (R. 982, Appendix p. xviii) and then stating; "the evidence as a whole must show a deficiency for each of the prosecution years" and then deliberately refused to apply this rule to the case at bar. (R. 983, Appendix p. xviii.)

The *Calderon* case was dealing with corroborative evidence and the holding was that proof of deficiencies for each year is *corroborated* by proof of an overall increase in net worth.

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**CONCLUSION.**

The writ of certiorari should issue herein to correct the foregoing errors and petitioner prays that this Court make its order accordingly.

Dated, San Francisco, California,
December 3, 1956.

Respectfully submitted,
LEO R. FRIEDMAN,
*Attorney for Petitioner.*

**(Appendix Follows.)**

## Appendix

*United States Court of Appeals*
*for the Ninth Circuit*

| | |
|---|---|
| Milton H. Olender, Appellant, vs. United States of America, Appellee. | No. 14,916 Sept. 24, 1956 |

Appeal from the United States District Court,
Northern District of California,
Southern Division

Before: Healy, Chambers and Barnes, Circuit Judges.

Barnes, Circuit Judge:

This is a criminal prosecution for income tax evasion. Appellant was convicted on four counts charging him with wilfully attempting to defeat and evade federal income taxes by filing false and fraudulent returns. Counts 1 and 3 had reference to his own 1945 and 1946 income tax returns; counts 2 and 4 to his wife's 1945 and 1946 income tax returns, which he prepared.

The government relied on the "net worth method" of establishing guilt. This required the government to show "with reasonable certainty" the opening net worth of appellant as of December 31, 1944, his net worth as of

December 31, 1945, and his closing net worth as of December 31, 1946, Holland v. United States, 348 U.S. 121, and that appellant and his wife realized taxable income which they failed to report. According to the government's computations, appellant and his wife should have reported net taxable income of $87,999.24 in 1945, and $43,212.00 in 1946. Appellant had returned $41,067.61 in 1945, and $23,514.62 in 1946. The figures included the income of both the husband and wife, who reported their income on a community property basis.

The defense attempted to show that the net worth of appellant and his wife, as of December 31, 1944, was higher than that computed by the government, that the increase in their net worth was less, and that the greater part of this increase did not represent taxable income because it belonged to someone else, or was obtained through nontaxable gifts.

Most of the facts on which the government based its calculations were contained in a stipulation between the parties and an amendment thereto. There were 1,000 pages of record, and many exhibits.

Appellant urges the conviction must be reversed because of insufficiency of the evidence as to net worth, and because the testimony of witness John Sanchirico was improperly admitted.

*Insufficiency of Evidence*

Appellant specified the evidence was insufficient to establish the offenses charged in that his net worth at the three critical dates was not established to a reasonable certainty. This was because:

(a) Appellant had $70,000 plus, in cash, in a safe deposit box on December 31, 1944, and not $50,000, as the government contended.

(b) The $20,000 in par value of government bonds in appellant's possession at the end of both 1945 and 1946 were the property of and had been purchased by appellant's mother, Mollie Olender, and were not his property, as the government contended.

(c) Appellant had $20,550 in merchandise (sailor suits) on hand at the end of 1944, which were not included by the government as assets.

(d) Appellant should not have been credited with $7,724 on hand at the end of 1945, which the government computation included.

In the previous appeal the decision of this court, Olender v. United States, 210 F.2d 295, emphasized that there was a decided conflict in the evidence, and "since the defense case rested primarily upon the testimony of appellant, it was his credibility which was principally at issue." The same may be said of the second trial.

A reading of the transcript quickly indicates that the methods used by appellant to keep track of his financial affairs, did little to inspire confidence in either his integrity or his truthfulness. Appellant was no untutored son of the soil. He was a university graduate with a bachelor of science degree, "with honors", in economics. He had studied principles of accounting, statistics, money and banking, cost accounting, corporation finance, business organization and administration, factors in industrial efficiency and other comparable subjects. He was suffi-

ciently well versed in income tax procedure to make out income tax returns for himself, his wife, his mother, and his friends. His memory of business transactions involving many thousands of dollars was, to put it charitably, not good.

Mr. Ringo, a certified public accountant hired by appellant, attempted to prepare a net worth statement for his client but ran into numerous difficulties. When one set of figures furnished by appellant had been worked out, some new expenditure would come to light, and throw the proposed statement "out of balance." As an example, Ringo, after coming to preliminary conclusions, discovered records showing appellant's purchase, theretofore undisclosed to the accountant, of a single premium, fully paid, life insurance policy costing $15,833.46, in 1945. It was then that appellant, for the first time, told his accountant about $10,500 in cash moneys his mother allegedly had given him. Appellant suggested to his accountant that no mention be made of a $5,000 investment in Asturia Export Corporation, made in 1944, because it was then worthless; that Ringo should "leave this out." His accountant explained this could not be done, because its then worthlessness bore no relationship to the net worth issue upon which the government's case was based.

On many other factual matters the appellant could not be considered a convincing witness. He could give no estimate of what his living expenses were in 1945; had no record of such expenses; no idea of what food cost for three people in 1945; no idea nor estimate as to such matters in 1946. He also testified that in 1945 he received $2,500 or $3,000 from his wife's mother, Mrs. Foote,

although she had been on old age assistance for seven years.

Appellant claimed he lived frugally in 1945. The stipulated personal expenses deductible, i.e., the appellant's cost of living for himself, his wife and daughter for that year, was $2,739.38. This was some $230 less than the deduction he claimed that year for donations to charity.

Before trial appellant supplied certain information to his accountant, Ringo, explaining the extent of cash moneys kept by him in his safe deposit box. These were appellant's estimates only. These estimates showed (United States Exhibit 19) $50,000 on hand on December 31, 1944; $7,000 on hand on December 31, 1945; and zero on hand on December 31, 1946. But these estimates were not haphazardly arrived at:

"Q. Did you go over that net worth statement with Mr. Olender after it was prepared?

"A. (By Mr. Ringo) Very much so, yes."

At the trial appellant claimed he had over $70,000 in cash on hand in his safe deposit box on December 31, 1944. There is corroboration that in May of 1944 appellant did have $70,000 or $71,000 cash in his box. This corroborated evidence raised the preliminary question of the worth of United States Exhibit 10—the final product of appellant's accountant's efforts to establish valid net worth statements—and the subsequent question as to whether or not the government's evidence had been corroborated.

Appellant remembered with certainty that he had in the box in cash in the beginning of 1945, "over $70,000." At the end of 1945 he could approximate no figure. It was more than $5.00. But he had no positive recollection. At

the beginning of 1946, defendant's answer was the same, and at the end of 1946, he couldn't approximate it, "it would only be a guess." "There was some money in there, I don't remember how much."

In the original net worth figures prepared by appellant's auditor from information supplied by the appellant (though only as estimates), appellant was hard put to explain how he accumulated large sums of cash he thereafter expended. So that appellant might rebut any inference that his expenditures in 1945 and 1946 were from unreported taxable income, appellant submitted to the government, through his auditor, an analysis of his net worth January 1, 1942, to December 31, 1947. (Olender's Exhibit 7, attached to his Exhibit 1, which was United States Exhibit 10 in this trial.) Appellant's Schedule A, attached to such Exhibit 7 (part of United States Exhibit 10), read as follows:

"MILTON H. OLENDER,
Gifts from Mrs. J. Olender—Mother
(per Books of Mrs. J. Olender—
Information from M. H. Olender)
"WITHDRAWALS FROM SAVINGS ACCOUNT IN FRESNO:

| Date | Amount |
|---|---|
| February 3, 1942 | $ 1,000.00 |
| March 31, 1943 | 1,000.00 |
| January 6, 1944 | 2,000.00 |
| July 5, 1944 | 2,500.00 |
| December 15, 1944 | 1,000.00 |
| January 2, 1945 | 3,000.00 |
| | $10,500.00" |

At the first trial, appellant testified that these moneys were given him by his mother in cash. At the second trial, the government produced important testimony bearing on these alleged gifts. United States Exhibits 40 through 48, inclusive, were photostats of the records of the Bank of America, Fresno Branch. They showed Mollie Olender's savings accounts No. 3941 and No. 2146 (deposits and withdrawals) and Mollie Olender's commercial accounts. These records show that Mrs. Mollie Olender:

(1) Withdrew $1,000 from savings account No. 3941 on February 3, 1942, and that she deposited the same in her savings account No. 2146 on the same day. She withdrew $200 of it from No. 2146 that day.

(2) Withdrew $1,000 from savings account No. 3941 on March 31, 1943, and deposited it to her commercial account.

(3) Withdrew $2,000 on January 6, 1944, from account No. 3941, and deposited it to savings account No. 126 of Terry Olender Gamborg. This had not been withdrawn up to June 30, 1952.

(4) Withdrew $1,000 on December 15, 1944, from No. 3941, and deposited it on the same day in her commercial account. No withdrawals of any similar sums had been made from the commercial account up to June, 1945.

(5) Withdrew $3,000 on January 2, 1945, from No. 3941 and deposited it to Terence (sic) Olender Gamborg.

(6) Withdrew $2,500 on July 5, 1944, from the First National Bank in Fresno. There was no evidence of redeposit of this money, and appellant testified it was given to him. See "some corroboration" in defendant's Exhibit Q, although appellant's oral testimony was unprecise.

Thus, as to five of the six gifts testified to by appellant under oath, this documentary evidence proved the falsity of his testimony.

A lack of certainty or an utter lack of recollection on the part of the taxpayer cannot tip the scales against the government, for "skillful concealment cannot be an invincible barrier to proof." United States v. Johnson, 319 U.S. 503, 517.

An inadequate system of recording income hardly places the taxpayer in a different class than one who keeps no book at all. "Both are receiving unrecorded amounts of income." United States v. Calderon, 348 U.S. 160. In the Canderon case, where defendant relied on a "hoard" in his safe deposit box, a lesser increase in assets ($48,000 in four years) over and beyond income, plus receipt of unrecorded amounts of taxable income, was sufficient variance, compared to reported income, to support an inference of tax evasion. We think the same inference clearly exists here. That same case (Calderon) disposes of appellant's claim that each year's figures must be established to avoid fatal uncertainty. In Calderon, taxpayer's hoard was alleged to have been $16,000 or $17,000; the government's net worth computation started with $500.

> "But one problem remains, the $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years and respondent was convicted on all four counts. It might be argued that there must be evidence of a deficiency for *each* of the years here in issue. Ther is no merit in this contention. The evidence need not comply with the niceties of the annual accounting concept." Calderon v. United States, 348 U.S. 160, 168.

*The $20,000.00 in Bonds*

Appellant relies heavily on his contention that $20,000 of bearer bonds in his safe deposit box were purchased by him for his mother, with her money. Appellant had two safe deposit boxes, one in his name; one in the joint names of himself and his mother. The bonds were kept in the former box. In 1947, appellant returned as his own property the income from these bonds. In other years, his mother returned the interest, on returns prepared by appellant. Appellant testified he kept these bonds in an envelope at the time of the first trial, with his mother's name on the envelope. Appellant did not produce the envelope at either trial, although he had it at the time of the first trial, nor did he know what happened to it after the first trial, nor whether it had been destroyed, nor when he had last seen it.

On August 23, 1946, appellant wrote in answer to a letter of inquiry from the government that the $20,000 in bonds were "purchased for the account of my mother, • • • on written instructions from her, which I have in my possession." Appellant apparently referred to two letters written by his mother. The first letter, dated November 23, 1945, states:

> "If you do buy the bonds, just put them in our box for safekeeping."

and the second letter, dated December 14, 1955, reads:

> "I have been forgetting to mention those bonds you bought for me last week."[1]

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[1]The pertinent portions of this letter, in appellant's opinion expressed on the stand, continue as follows:

"When you get them, keep them up there for me; as I wrote you previously before, I still prefer that you put your money

No evidence was advanced to show any withdrawals from Mrs. Mollie Olender's bank accounts, with which the $20,000 in cash could have been advanced to appellant, which was the procedure appellant followed when the government questioned the $10,500 he claimed in gifts from his mother.

Mollie Olender died June 2, 1951. Nothing had been done by appellant prior to her death to obtain her version of this transaction, beyond his retaining the letters above described.

The federal estate tax return (United States Exhibit 52) filed December 12, 1952, (by appellant's sister, not by appellant) shows that decedent, Mollie Olender, had purchased over $25,000 par value in government bonds and had them issued in joint tenancy with her daughter, and over $17,000 par value in government bonds, and had them issued in joint tenancy with her son, the appellant. The estate tax return further stated:

> "The decedent may have had an interest in $20,000 United States Treasury Bonds * * * as for the past few years interest of $450 on bonds of this type was included as income in decedent's income tax returns. Decedent's son was her accountant and prepared her income tax returns."

On March 30, 1953, after the first trial, a supplemental inventory was filed by this appellant, as co-executor, in

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into government bonds instead of stocks. I realize the Bank of America dividends are higher and what you say about them is true. When you make your next payment to me, I may let you convince me, but I still think the bonds are the safest investment."

This reference to "your money" is more consistent with the appellant buying bonds with his own money than it is that the money belonged to his mother.

the estate of Mollie Olender, deceased, listing the $20,000 in bonds as part of the estate. On July 13, 1953, the $20,000 were sold on order of "Estate of Mollie Olender, by Milton Olender," and the proceeds credited to the estate. Again, on the issue of his mother's ownership of $20,000 in bonds, there was ample conflicting evidence from which the trier of fact could come to a conclusion either way as to whether the appellant had used his mother's money or his own, to purchase these bonds.

*The Sailor Suit Inventory*

Although appellant claims he should be credited with having purchased $20,550 worth of sailor suits from one Goodman in 1945, he could, in 1947, remember but one transaction with Goodman, involving $1,380 and had no recollection of the $20,550 transaction involving the issuance and transmission of nine cashier's checks. Even after being shown the checks, and the applications therefor, bearing his signature, appellant "could not recall the circumstances" under which he had issued such checks and acquired this merchandise. This merchandise, though kept in the store and later sold, was never listed as a part of appellant's inventories, never entered on appellant's books as having been purchased or sold, and never insured, because it was "worthless" or "was to be returned" or because "no profit was made on it." When appellant's own auditor, Mr. Ringo, attempted to ascertain the facts about this merchandise, Ringo was told to take the matter up with appellant's lawyer. It was not until after the first trial of this matter that Mr. Ringo was told by appellant of "merchandise on hand, not included in inventories."

*The $7,724 Item*

Should $7,724 have been included as an asset of appellant at the end of 1945?

According to one interpretation of the evidence, the $7,724 represented a part of the $20,550 figure commented upon above. This was the transaction concerning which, at first, the appellant had no memory. But he testified that after he had received the suits from Goodman, through Levy, Levy in 1945 sold 200 suits for $5,000 which went into the Army and Navy books as a capital investment. But, in 1945 when 280 more suits were sold for $7,000, Levy kept the money. This, Levy gave to Moe Saraga, a dealer in New York. Appellant then gave Saraga $24,500 from his "store account". Saraga could not deliver all the suits wanted, and so returned the $7,000 plus $725 for 49 suits undelivered from the $24,800 advance, which amount, less $1 for a bank charge, represents the $7,724 claimed.

Obviously, if the trier of fact were to credit the appellant with the $20,500 in sailor suits, it should not again credit the $7,000 representing cash received through sale of some of those suits. And, whether or not the $7,724 were included as an asset of appellant at the end of 1945, it would have increased or reduced the amount of undeclared income, but it would not have done so appreciably, nor to a degree decisive of the issues herein.

The foregoing recital of certain of the evidence is not exhaustive. It is merely to highlight the reasons why the conclusion of the appellate court, after the first trial, is equally pertinent after the second trial—that the credibility of the appellant was the principal issue in the case.

We cannot say that the government did not establish "with reasonable certainty" appellant's net worth as of December 31, 1944. When the government introduced proof of likely taxable sources from which a jury can reasonably find that the net worth increases sprang, it need not negative all possible non-taxable sources.

In criminal prosecutions for federal income tax evasion, evidence corroborative of defendant's admissions need not prove the offense beyond a reasonable doubt, or by a preponderance of the evidence, but there must exist substantial evidence, independent of the alleged admission, that the offense has been committed, and the evidence as a whole must prove defendant's guilt beyond a reasonable doubt. Smith v. United States, 348 U.S. 147, 156; United States v. Calderon, 348 U.S. 160.

The care with which the trial judge instructed the jury on this subject is of importance. Among other instructions the jury received was this:

> "In order to safeguard the defendant, the law requires that these statements (of defendant) relating to vital links in the government case be corroborated. In this connection, the $50,000 cash item and $7,000 cash item, used by the government in Exhibit 50 (i.e., amount of cash in safe deposit box) cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath."

We conclude the jury was properly and carefully instructed, and we will not interfere with their decision on issues of fact, in view of the conflicting testimony in this case.

This brings us to the alleged error in admitting the testimony of John Sanchirico.

It should be said that much of the criticism of the introduction of this testimony goes to its weight, and not to its admissibility. The witness, as executive vice president of Seagoing Uniform Corporation, was capable of identifying the records of that business. He had worked with the company over 25 years, had been active in management of it over 15 years. His firm had an account with the Army & Navy Store at 1926 Broadway, Oakland, the appellant's place of business. Sanchirico did not know appellant, but did know Goodman, the man to whom defendant sent several thousand of dollars with which to buy sailor's uniforms. Goodman paid the invoices. Sanchirico's plant shipped uniforms in accordance with Mr. Goodman's instructions, to the ultimate consignee. A shipping clerk would hand-write a shipping memorandum which would indicate how many garments were involved, and where they were shipped to, name of customer, and the street number or city. Exhibits 66 to 71 inclusive, all indicated, according to the witness, shipments of sailor suits to Olender. These documents were kept by the company and were made simultaneously with the transaction, in the regular course of business.

The only objection made to Exhibits 66 to 71 was that they were "not proper rebuttal." This objection was not well taken; nor, had an objection been made upon grounds of hearsay, would it have been valid. *Part* of each document did not purport to involve the appellant, but *part* of each written document did. The objection on grounds of hearsay, not having been made before the trial court,

cannot be urged here as reversible error. Sekinoff v. United States, 283 F. 38; Bank of Italy v. Romeo & Co., 287 F. 5.

We recently ruled on this same evidentiary point in civil litigation, Batelli v. Kagan, et al., 9 Cir., No. 14,803, decided August 6, 1956. In this criminal prosecution, Rule 26 of the Rules of Criminal Procedure (Title 18 U.S.C.A.) applies, rather than Rule 43 of the Rules of Civil Procedure (Title 28 U.S.C.A.). The "Act of Congress" necessary to make the principle of the "Uniform Business Records in Evidence Act" applicable is Title 28 U.S.C.A. §1732. The very purpose of this section is to relax the common law evidentiary rule, and permit introduction into evidence those contemporaneous business records which once were inadmissible. Hartzog v. United States, 1954, 217 F. 2d 706. And even if such business records, such as bills of lading, are hearsay as to the appellant, they are admissible as records made in the regular course of business. Intermondale v. North River, 1951, 100 F. Supp. 128. Evidence disclosing a manufacturer's practice relating to invoices establishing the contents of clothing cartons, was held admissible in United States v. Garvey, 1945, 150 F. 2d 767.

The judgment of conviction on all four counts should be, and is, affirmed.

(Endorsed:) Opinion. Filed, Sept. 24, 1956,
Paul P. O'Brien, Clerk.

*United States Court of Appeals*
*for the Ninth Circuit*

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| Milton H. Olender,<br>Appellant,<br>vs.<br>United States of America,<br>Appellee. | No. 14,916 |

## JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and Entered: September 24, 1956.

Paul P. O'Brien, Clerk.

*United States Court of Appeals*
*for the Ninth Circuit*

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| Milton H. Olender, Appellant,<br>vs.<br>United States of America, Appellee. | No. 14,916<br>Nov. 8, 1956 |

On Petition for Rehearing

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Before: Healy, Chambers, and Barnes, Circuit Judges.

Per Curiam.

The Petition For Rehearing consists primarily of an endeavor to re-discuss and re-weigh the sufficiency of the evidence. On this point, our view remains unaltered.

The sole issue of substance raised by the petition for rehearing relates to an alleged misapplication of the *Calderon* case, to the instant facts. Appellant asserts that we have cited and relied upon *Calderon* as authority for the proposition that there need not be evidence of a tax deficiency for *each* of the years in question, 1945 and 1946. The precise language of the case as we quoted it justifies that position.

Obviously, *Calderon* does not stand for that proposition, nor was it referred to for such purpose. In order to correct appellant's misconception as to the nature of our reliance on the *Calderon* case, we now clarify our reference thereto.

The quotation of the *Calderon* case should read as follows:

"But one problem remains. The $17,000 hoard of cash could have absorbed the computed income deficiency for one or more of the prosecution years, and respondent was convicted on all four counts. It might be argued that independent evidence showing a $30,000 deficiency is not enough—that there must be evidence that this sum resulted in a deficiency for *each* of the years here in issue. There is no merit in this contention. In the first place, this evidence is merely *corroborating* respondent's cash-on-hand admissions and need not comply with the niceties of the annual accounting concept. While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial deficiency for the over-all prosecution period."

We are aware of, and we are bound by the Supreme Court's statement that "the evidence as a whole must show a deficiency for each of the prosecuting years."

We affirm that the government must establish *some* deficiency for each of the years. Otherwise, there could be no violation. However, it seems equally plain that it is not incumbent upon the government to prove the amount of the deficiency with mathematical exactitude for each year in a prosecution involving consecutive years. A contrary rule would enable the guilty to say, "Yes, I am guilty, but since you cannot allocate the deficiencies to each particular year with exactness, although there was some deficiency in each year, I must go free." We reject the idea that surreptitious dealings which inhibit the

prosecution's ability to make a precise allocation for each year can furnish a cloak of immunity to tax evaders. We do not feel that Justice Clark's words were designed to erect an artificial barrier to tax enforcement. The evidence clearly supports the jury's finding of a tax deficiency in both 1945 and 1946.

The Petition For Rehearing is denied.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing.

Filed Nov. 8, 1956.

Paul P. O'Brien, Clerk.

## U. S. EXHIBIT 50

### Net Worth

| | 12-31-44 | 1231-45 | 12-31-46 | Exhibit No. | Witness |
|---|---|---|---|---|---|
| ASSETS | | | | | |
| Cash in store register | $ 2,500.00 | $ 1,000.00 | $ 1,000.00 | | Stipulatio |
| Net investment, Army-Navy Store | 84,735.50 | 89,800.50 | 57,414.65 | | Stipulatio and Ringo |
| Nonbusiness bank accts. | 3,822.89 | 31,485.58 | 36,783.05 | | Stipulatio |
| Cashiers check #25104696 | ..... | 7,724.00 | ..... | 34 | Carroll |
| Undeposited drawing check | 1,000.00 | ..... | ..... | | Stipulatio |
| Corporation stock, (excluding Asturias) | 552.95 | 1,150.00 | 45,382.40 | | Stipulatio |
| Asturias stock | ..... | ..... | 5,000.00 | 31 | Horne |
| Asturias loan | ..... | ..... | 5,000.00 | 31 | Horne |
| U.S. Bonds: Series "E" | 693.75 | 768.75 | 768.75 | | Stipulatio |
| Real Estate, net of depr. | 31,600.00 | 30,875.00 | 68,511.31 | | Stipulatio |
| Household Furniture | 5,000.00 | 5,000.00 | 29,701.67 | | Stipulatio |
| Contra Costa Associates, Loan | ..... | ..... | 1,000.00 | | Stipulatio |
| | | | | | Stipulatio (amoun |
| U. S. Treasury Bonds | | | | | |
| 2 %—51-53 | 10,000.00 | 10,000.00 | 10,000.00 | | |
| 2¼%—59-62 | ..... | 8,000.00 | 8,000.00 | | |
| 2¼%—56-59 | 1,000.00 | 1,000.00 | 1,000.00 | | |
| 2 %—52-54 | 13,000.00 | 13,000.00 | 13,000.00 | | |
| 2¼%—59-62 | ..... | 25,000.00 | 25,000.00 | | |
| 2¼%—59-62 | ..... | 25,000.00 | ..... | 28 | Ringo |
| Paid-up Life Insurance | ..... | 15,833.46 | 15,833.46 | | Stipulatio |
| Cash in Safe Deposit Box | 50,000.00 | 7,200.00 | ..... | 21 | Ringo |
| | $203,905.09 | $272,837.29 | $323,395.29 | | |
| LIABILITIES | | | | | |
| Loan Payable | | | | | |
| Mrs. J. Olender | $ 5,000.00 | $ 5,000.00 | $ 15,500.00 | | Stipulatio |
| Accounts Payable | | | | | |
| W. & J. Sloane | ..... | ..... | 24,701.67 | | Stipulatio |
| Total | $ 5,000.00 | $ 5,000.00 | $ 40,201.67 | | |
| Net Worth | $198,905.09 | $267,837.29 | $283,193.62 | | |



### Net Income

| | 1945 | 1946 | Exhibit No. | Witness |
|---|---|---|---|---|
| t worth at December 31 | $267,837.29 | $283,193.62 | | |
| t worth at January 1 | 198,905.09 | 267,837.29 | | |
| | $ 68,932.20 | $ 15,356.33 | | |
| rease in Net Worth | | | | |
| Add—Nondeductible expenditures | | | | |
| Included in stipulation | 19,081.32 | 23,985.63 | | |
| Other expenditures introduced during trial (schedule attached) | 125.49 | 4,335.04 | | |
| | $ 88,139.01 | $ 43,677.00 | | |
| duct nontaxable portion of net gain from sales of assets | 139.77 | 464.47 | | Stipulation |
| t taxable income | | | | |
| Husband / Wife | | | | |
| 45 $44,562.19 / $43,437.05 | $ 87,999.24 | | | |
| 46 22,363.76 / 20,848.77 | | $ 43,212.53 | | |
| t taxable income per returns | | | | |
| Husband / Wife | | | | |
| 45 $21,096.38 / $19,971.23 | $ 41,067.61 | | | |
| 46 12,514.81 / 10,999.81 | | $ 23,514.62 | | |
| reported Income | | | | |
| Husband / Wife | | | | |
| 45 $23,465.81 / $23,465.82 | $ 46,931.63 | | | |
| 46 9,848.95 / 9,848.96 | | $ 19,697.91 | | |

### Nondeductible Expenditures

| | 1945 | 1946 | Exhibit No. | Witness |
|---|---|---|---|---|
| penditures not included in Stipulation | | | | |
| agnin | ..... | $ 863.73 | 27 | Davis |
| ay Shop | ..... | 1,391.01 | 30 | Mendelson |
| t Young | ..... | 925.00 | 23 | Young |
| o. Belling | $ 125.49 | 155.30 | 26 | Belling |
| rs | | 1,000.00 | | Foley |

Milton H. Olender
Oakland, California

Year - 1

**Tax Liability**

| | Husband | Wife | Total |
|---|---|---|---|
| Net income per returns | $21,096.38 | $19,971.23 | $41,067 |
| Unreported income (½ each spouse) | 23,465.81 | 23,465.82 | 46,931 |
| Net income corrected | $44,562.19 | $43,437.05 | $87,999 |
| Deduct, net long-term capital gain | 69.89 | 69.88 | 139 |
| Ordinary net income | $44,492.30 | $43,367.17 | $87,859 |
| Normal tax exemption, per returns | 500.00 | 500.00 | 1,000 |
| Normal tax net income | $43,992.30 | $42,867.17 | $86,859 |
| Ordinary net income | $44,492.30 | $43,367.17 | $87,859 |
| Surtax exemptions, per return | 1,000.00 | 500.00 | 1,500 |
| Surtax net income | $43,492.30 | $42,867.17 | $86,359 |
| Normal tax @ 3% | $ 1,319.77 | $ 1,286.02 | $ 2,605 |
| Surtax (highest rate 69%) | 22,149.69 | 21,718.35 | 43,868 |
| Partial tax | $23,469.46 | $23,004.37 | $46,473 |
| Add, 50% net long-term capital gain | 34.94 | 34.94 | 69 |
| Total tax liability | $23,504.40 | $23,039.31 | $46,543 |
| Tax liability, per returns | 7,931.86 | 7,563.89 | 15,495 |
| Unreported tax liability | $15,572.54 | $15,475.42 | $31,047 |



ton H. Olender
kland, Calif.

Year - 1946

**Tax Liability**

| | Husband | Wife | Total |
|---|---|---|---|
| income per returns | $12,514.81 | $10,999.81 | $23,514.62 |
| reported income (½ each spouse) | 9,848.95 | 9,848.96 | 19,697.91 |
| income corrected | $22,363.76 | $20,848.77 | $43,212.53 |
| duct, net long-term capital gain | 232.24 | 232.23 | 464.47 |
| dinary net income | $22,131.52 | $20,616.54 | $42,748.06 |
| Exemptions, per returns | 1,000.00 | 1,000.00 | 2,000.00 |
| ome subject to normal tax and surtax | $21,131.52 | $19,616.54 | $40,748.06 |
| rmal tax @ 3% | $ 633.95 | $ 588.50 | $ 1,222.45 |
| rtax (highest rate 53% on husband, 50% on wife) | 7,259.71 | 6,468.27 | 13,727.98 |
| tative tax | $ 7,893.66 | $ 7,056.77 | $14,950.43 |
| reduction of tentative tax | 394.68 | 352.84 | 747.52 |
| rtial tax | $ 7,498.98 | $ 6,703.93 | $14,202.91 |
| d, 50% net long-term capital gain | 116.12 | 116.12 | 232.24 |
| al tax liability | $ 7,615.10 | $ 6,820.05 | $14,435.15 |
| Tax liability per returns | 3,054.85 | 2,507.94 | 5,562.79 |
| Unreported tax liability | $ 4,560.25 | $ 4,312.11 | $ 8,872.36 |

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412447—57

# In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 612

MILTON H. OLENDER, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the Court of Appeals (R. 968–979, Pet. App. i–xv) is reported at 237 F. 2d 859.

### JURISDICTION

The judgment of the Court of Appeals was entered on September 24, 1956 (R. 980, Pet. App. xvi) and a petition for rehearing was denied on November 8, 1956 (R. 983, Pet. App. xix). The petition for writ of certiorari was filed on December 7, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

### QUESTION PRESENTED

Whether the evidence was sufficient to support the verdict.

## STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

## STATEMENT

On February 27, 1952, a four-count indictment was filed against petitioner in the United States District Court for the Northern District of California charging wilful attempts to evade his own and his wife's income taxes for the years 1945 and 1946, in violation of Section 145 (b) of the Internal Revenue Code of 1939. The amounts of net income (reported on the community property basis) and the taxes due, as reported in the returns and as charged, are as follows (R. 3–7):

| | Reported | | Corrected | |
|---|---|---|---|---|
| | Net income | Tax | Net income | Tax |
| Count I (Petitioner—1945) | $21,096.38 | $7,931.86 | $34,553.69 | $16,478.92 |
| Count II (Wife—1945) | 19,971.23 | 7,563.89 | 33,428.53 | 16,038.82 |
| Count III (Petitioner—1946) | 12,514.81 | 3,054.85 | 23,778.72 | 8,368.44 |
| Count IV (Wife—1946) | 10,999.81 | 2,507.94 | 22,263.71 | 7,553.94 |
| Total | 64,582.23 | 21,058.54 | 114,024.65 | 48,440.12 |

Petitioner's first conviction on these counts was reversed by the Court of Appeals for errors committed by the trial court in the admission of evidence and in instructions to the jury. *Olender* v. *United States,* 210 F. 2d 795 (C. A. 9th). After a second jury trial petitioner was again convicted on all counts. (R. 7.) On August 23, 1955, he was sentenced to concurrent three-year prison terms on each count and fined $10,000 on Count I and $10,000 on Count III. (R. 8–10.) The Court of Appeals affirmed. (R. 968–979, Pet. App. i–xv.)

The evidence to support the verdict may be briefly summarized as follows:

Petitioner is a graduate of the University of California, where he studied accounting and auditing. (R. 630.) He prepared all of the income tax returns in question, as well as income tax returns for some of his relatives and employees. (R. 94, 630–631.) During the prosecution years he was the sole proprietor of a retail store dealing in military supplies, uniforms and camping equipment. (R. 46, 96, 148, 550.) The store records consisted of cash books, a general ledger and journal, and a purchase register or ac-

counts payable register. (R. 101.) Petitioner would deal in large sums of currency and keep no record of the transactions. (R. 306–312, 464–465.) Thus, in January, 1944, he purchased $20,550 worth of merchandise from one Goodman with cashier's checks and made no entry on his books. When he was confronted with the cashier's checks during the course of the Treasury agents' investigation, he denied any knowledge of this transaction. (R. 47, 50–52, 55, 66–70, 104.) At least $5,000 of gross receipts received from the sale of merchandise in 1945 was entered on petitioner's books as an investment of capital. (R. 591–592.) His daily cash receipts were normally recorded in the books as a lump sum figure and petitioner did not retain the cash register tapes which he claimed would have shown the accuracy of those figures. (R. 122–123.)

The Government's reconstruction of the income of petitioner and his wife, made on the net worth-expenditures method, disclosed that their true income for 1945 (Counts I and II) totalled $87,999.24 as against $41,067.61 reported; and that their true income for 1946 (Counts III and IV) totalled $43,212.53 as compared with $23,514.62 reported. (Pet. App. xx-xxi.) Most of petitioner's assets and liabilities were stipulated at the trial. (R. 129–141.) The Government gave petitioner credit for $50,000 cash on hand at the end of 1944 and $7,200 cash on hand at the end of 1945. These credits were based upon statements petitioner made to his accountant that he had accumulated such cash by hoarding in a safe deposit

box currency given to him, mainly as gifts over a ten-year period, by his deceased father. (R. 160–162, 166–167, 243–246.) At the trial petitioner testified that he had at least $70,000 in cash on hand at the end of 1944, and denied any recollection of having told his accountant that he had only $50,000. (R. 715–722.) The trial court instructed the jury on the issue of cash on hand as follows (R. 926–927):

> In many net worth cases the government relies on the taxpayer's statements made during the course of a governmental investigation in order to establish vital links in the government's case. Sometimes these statements are made by a taxpayer more concerned with a quick settlement than an honest search for the truth. In order to safeguard the defendant, the law requires that these statements relating to vital links in the government's case be corroborated. In this connection, the $50,000 cash item and the $7,200 cash item used by the government in Exhibit 50 cannot be considered by you in determining the opening or closing net worth, because the government did not corroborate that. You can use, however, whatever amounts the defendant said he had while he was on the witness stand here under oath.

In addition to the issue of cash on hand, the main questions of fact were (a) whether $20,000 worth of Government bearer bonds purchased by petitioner in 1945 belonged to him or his mother and (b) whether the merchandise inventory shown on petitioner's books at the end of 1944 was understated by $20,550.

## ARGUMENT

Petitioner's sole contention is, in essence, that the evidence was insufficient to support the verdict. He argues that the Government's reconstruction of his net worth (Pet. App. xx–xxi) was inadequate and erroneous in that (a) the amount of his cash on hand at the end of 1944 and 1945 was not established (Pet. 25–34, 35–36); (b) the amount of his merchandise inventory at the end of 1944 was understated by $20,550 (Pet. 34); (c) his investments in Government bonds as of the end of 1945 were overstated by $20,000 by reason of the improper inclusion of bonds owned by his mother (Pet. 36–38); and (d) there was no showing of a likely source of unreported income (Pet. 38–40.) None of these contentions has merit or presents any question warranting review by this Court.

(a) The petitioner's cash on hand at the starting point was fixed by his own testimony at the trial. As we have shown, the trial court removed from the jury's consideration the petitioner's extra-judicial admissions as to the amount of his cash on hand at the end of 1944 and 1945 (*supra*, p. 5.)[1] The jury was told, however, that it could rely upon his admissions at the trial. (R. 927). While petitioner professed to have no recollection of his cash on hand at the end of 1945

[1] In ruling out this evidence the trial court seems to have misinterpreted *Smith* v. *United States*, 348 U. S. 147, and *United States* v. *Calderon*, 348 U. S. 160, as requiring direct corroboration of petitioner's extra-judicial admissions as to cash on hand. Sufficient corroboration was furnished by the showing that petitioner's visible net worth greatly increased at a time when he was receiving unrecorded amounts of income. (*Supra*, p. 4.) *United States* v. *Calderon*, 348 U. S. at 165.

he testified that at the end of 1944 it was "[o]ver $70,000" (R. 715–717) and produced a witness who placed the amount at $70,300 as of April 22, 1944 (R. 501–503).[2] If the jury credited petitioner with approximately $70,300 at the starting point, and it must be assumed that they did, the effect would have been to reduce the unreported 1945 community income of petitioner and his wife from the $46,931.63 shown in the Government's reconstruction (Pet. App. xx–xxi) to $19,431.63.[3] This deficiency in income, when divided on the community property basis, is substantial. Petitioner was charged (R. 3–5) with having understated his 1945 income by $13,457.31 and his wife's by the same amount. The proof, even when the cash on hand item is viewed in the light most favorable to petitioner, showed an understatement of $9,715.81 with respect to each, i. e., about one-third of their true taxable income was unreported. The Government is, of course, not required in a criminal tax case to prove the precise amount of unreported income. *United States* v. *Johnson,* 319 U. S. 503, 518.

As for 1946, the jury would have been obliged to *increase* the unreported income claimed by the Government by $3,600 for petitioner and the same amount for his wife, because the opening (December 31, 1945)

[2] Petitioner's father, who allegedly gave him this currency between 1930 and 1940, died in 1940. (R. 160–162, 707–709.)

[3] This figure assumes that the jury charged petitioner with no cash on hand at the end of 1945, i. e., that the entire $70,300 was used during that year for investments and expenditures. The Government's figures (Pet. App. xx–xxi) credited petitioner with the use of only $42,800 of the hoard in 1945. Under the court's instructions, therefore, the jury was obliged to adjust the unreported income downward by the difference, $27,500.

cash on hand figure of $7,200 was withdrawn from their consideration by the court's instructions and there was no evidentiary basis for the substitution of another figure, petitioner having testified that he had no idea how much cash he had in the box at the end of 1945 or the end of 1946. (R. 715–718). The argument that cash on hand at the end of 1945 may have accounted for the excessive expenditures in 1946, and hence that the court below misconstrued *United States* v. *Calderon*, 348 U. S. 160 (Pet. 41–42), and did not require proof of some deficiency in each indictment year, is erroneous.[4] The cash on hand in the largest amount ever claimed by petitioner is completely used up by investments and expenditures in 1945, leaving him with a zero balance at the beginning of 1946. Thus the facts here are even less favorable to petitioner than those which in *Calderon* this Court found sufficient to sustain the conviction. Whereas in *Calderon* the alleged cash on hand would not have been used up by investments and expenditures in some of the years on which a conviction was had, here investments and expenditures in the first prosecution year use up all the alleged cash on hand and an understatement of income still remains.

(b) There is no merit in the contention that the petitioner's merchandise inventory at the starting point (December 31, 1944) was understated in the Govern-

[4] We understand petitioner to claim (Pet. 29–31) that a conflict exists between the instant case and *Vloutis* v. *United States*, 219 F. 2d 782 (C. A. 5th). The obvious distinction, aside from the many other factual ones, is that in that case the defendant did not testify; hence there were no judicial admissions relating to his opening net worth.

ment's computations by $20,550 (Pet. 34). The figure used by the Government was that which appeared upon petitioner's own books and income tax returns. (R. 130–131, 774.) The burden of showing that it was incorrect was, in these circumstances, plainly upon the petitioner. *United States* v. *Hornstein,* 176 F. 2d 217 (C. A. 7th); *United States* v. *Stayback,* 212 F. 2d 313 (C. A. 3d), certiorari denied, 348 U. S. 911; *United States* v. *Bender,* 218 F. 2d 869 (C. A. 7th), certiorari denied, 349 U. S. 920. Petitioner's testimony that he had failed to include in his inventory the $20,550 worth of merchandise purchased from Goodman (*supra,* p. 4, R. 582–606) but that it was actually on hand at the end of 1944, presented a simple question of credibility which the jury was free to resolve against him. Militating against petitioner's testimony was the evidence that he himself had taken a physical inventory at the end of each year (R. 185, 276); that he had counted a total of 110 sailor suits in stock at the end of 1944 and made no mention in his records of the additional 822 in question (R. 759–764); that these alleged 822 suits were not covered by petitioner's fire insurance policy (R. 787); and that during the agents' investigation petitioner denied having bought this merchandise (*supra,* p. 4) and claimed that if he had ever received it he had not kept it (R. 90–91).

(c) Petitioner's contention that the Government's computations erroneously charged him with $20,000 in Government bonds owned by his mother (Pet. 36–38) is equally without merit. Here again there was substantial evidence warranting the jury's resolution of

this factual issue in favor of the Government. The securities in question were bearer bonds purchased in December, 1945, by petitioner and his wife with cashier's checks which in turn had been purchased with currency. (R. 484–485, 554–555, 733–736.) Petitioner rented a safe deposit box jointly with his mother and another jointly with his wife. The bonds were kept in the latter. (R. 222–223, 731.) They were in petitioner's possession from the time of purchase until the time of sale. (R. 565). He clipped the interest coupons, and reported the interest earned in his 1947 individual income tax return. (R. 223–224, 569, 736, 744.) He appears also to have reported the interest on his 1946 return, though the evidence as to that is not conclusive. (R. 100, 744–745, 830.) The bonds were not reported on the mother's estate tax return filed by petitioner's sister, who was co-executor with him of the mother's estate. (R. 487–491, 740–742.) After petitioner's first trial he filed a "supplemental inventory and appraisement" on behalf of the estate (on March 30, 1953) reporting the bonds as the mother's property for the first time. (R. 740–741.) Treasury agents made an intensive examination of the banking transactions of petitioner's mother in an effort to learn whether she might have furnished the money for the bonds, but were unable to find transfers of funds or withdrawals of cash sufficient to account for them. (R. 483–484.) Petitioner's testimony with respect to these bonds (R. 554–569), like that relating to the disputed merchandise inventory, presented no more than conflicting evidence which the jury must be assumed to have rejected.

(d) Petitioner argues, finally (Pet. 38–40), that his conviction cannot stand because the evidence showed no likely source of income from which his net worth increases might have sprung. *Holland* v. *United States*, 348 U. S. 121, 137–138. Assuming that such proof is required, clearly the likely source of petitioner's unreported income was the store of which he was sole proprietor. It was shown that he had large currency dealings, some in connection with the store, of which no record was made; that at least $5,000 of income was entered as a capital contribution; and that petitioner's cash receipts were recorded as a lump sum figure, the accuracy of which it was impossible to test. (*Supra*, p. 4.) In these circumstances, we submit, the jury was entitled to infer that there was "proof of a likely source, from which * * * the net worth increases sprang" (*Holland* v. *United States, supra*, p. 138.)

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
*Solicitor General.*
CHARLES K. RICE,
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RICHARD B. BUHRMAN,
*Attorney.*

JANUARY 1957.

Office - Supreme Court, U.S.
FILED
FEB 9 1957
JOHN T. FEY, Clerk

# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1956

## No. 612

MILTON H. OLENDER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

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# In the Supreme Court
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OCTOBER TERM, 1956

No. 612

MILTON H. OLENDER,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

Petitioner requests a rehearing of the order of this Court made on January 21, 1957, denying his petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit, affirming petitioner's conviction for the evasion of income taxes due for the years 1945 and 1946, on the grounds that since the filing of the original petition herein intervening cir-

cumstances have arisen of substantial and controlling effect and of a substantial nature now but not heretofore available to petitioner, to-wit:

1. On January 28, 1957, this Court, in the certiorari proceeding of *Costello v. United States,* (No. 666, October Term, 1956) granted certiorari to determine the issue of whether one indicted and sentenced for filing a false and fraudulent return under sec. 145b of the Internal Revenue Code of 1939 and sentenced to more than one year imprisonment and to pay a fine of more than $1,000, was not sentenced under the wrong statute but should have been sentenced under sec. 3616a of said code, which provides for a maximum sentence of not more than one year and a fine of not more than $1,000. The same question is here involved as in the *Costello* case, all as hereinafter set forth.

2. That respondent's brief in opposition to the petition as filed herein contains erroneous computations and conclusions, all of which may have and probably did influence this Court in denying the petition.

1.

Petitioner was indicted for alleged violations of sec. 145(b) of the Internal Revenue Code of 1939 [26 U.S.C. 145(b)] for the years 1945 and 1946. The charging parts of each of the four counts of the indictment (save as to dates and amounts) reads the same. We quote from Count One of the indictment (italics added):

> "That on or about the 15th day of March, 1946, in the Northern District of California, Milton H. Olender, late of Oakland, California, did wilfully and know-

ingly *attempt to defeat and evade* a large part of the income tax due and owing by him to the United States of America for the calendar year 1945, *by filing and causing to be filed with the Collector of Internal Revenue* for the First Internal Revenue Collection District of California, at San Francisco, California, *a false and fraudulent income tax return* wherein he stated that his net income for said calendar year, computed on the community-property basis, was the sum of $21,096.38, and that the amount of tax due and owing thereon was the sum of $7,931.86, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $21,096.38, and that the amount of tax due and owing thereon was the sum of $7,931.86, whereas, as he then and there well knew, his net income for the said calendar year, computed on the community-property basis, was the sum of $34,553.69, and upon which said net income he owed the United States of America an income tax of $16,478.92." (R. 3-4.)

Petitioner was convicted on all four counts and sentence and judgment pronounced as follows:

"Count 1—Three (3) years and pay a fine of Ten Thousand Dollars ($10,000);

Count 2—Three (3) years;

Count 3—Three (3) years and pay a fine of Ten Thousand ($10,000);

Count 4—Three (3) years.

Ordered that said terms of imprisonment run concurrently." (R. 9.)

Section 3616a of the Internal Revenue Code of 1939 reads as follows:

> "Whenever any person—(a) Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, * * *"

It is manifest that each count of the indictment charges a violation of the foregoing sec. 3616a. (Cf. *Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685.)

As the maximum penalty that could be imposed under said sec. 3616a was one year imprisonment and a fine not exceeding $1,000, the trial court was without jurisdiction to impose the above penalties under sec. 145(b) of the code.

For the reasons that this Court granted the writ of certiorari in the *Costello* case, it should grant a rehearing herein and order the writ to issue.

The reasons why this question was not presented in the petition for the writ herein are as follows:

Following the decision of this Court in *Berra v. United States, supra,* several District Courts and Courts of Appeal rendered decisions to the effect that the Government could proceed under either of the code sections involved; among these decisions was that of *Moran v. United States,* 236 F.2d 361, where the issue was directly raised. Moran petitioned this Court for certiorari to review such ruling and this Court denied certiorari on Nov. 13, 1956, less than a month before the filing of the petition herein. In view of such action by this Court petitioner believed that

it would be futile to again raise the point herein; but, since the granting of the writ in the *Costello* case, this Court now considers the matter to be of sufficient importance to warrant a direct decision on the question.

It is our understanding that the question of jurisdiction can be raised at any time, even after trial and on appeal. (*Southern Pacific Co. v. McAdoo,* 82 F. 2d 121; *Electro Therapy Corp. v. Strong,* 84 F. 2d 766; *Cheyne v. A.T. & S.F. Ry. Co.,* 125 F. 2d 49.)

2.

The case for the prosecution was based on the net worth method of proof, based on the charges that petitioner attempted to evade the payment of income taxes for 1945 and 1946 by filing false and fraudulent income tax returns for such years.

The prosecution contended that there was an understatement of income for the year 1945 amounting to $46,931.63, based on cash on hand at the end of 1944 in the sum of $50,000 and $7,200 at the end of 1945.

In the respondent's brief in opposition filed herein, footnote 3 on page 7, it is admitted that under the Court's instructions the jury had to credit petitioner with $70,300 at the end of 1944 and that "Under the court's instructions, therefore, the jury was obliged to adjust the unreported income downward by the difference, $27,500." This reduces the unreported income to $19,431.63, and eliminates any cash on hand at the end of 1945. This figure includes $82,000 worth of bonds at the end of 1945, of which petitioner claimed there was $20,000 worth belonging to his mother.

If petitioner's contention is sound, then it wipes out any claimed unreported income for the year 1945.

The full substance of the evidence relied on to establish that these bonds belonged to Olender's mother is set forth in the petition herein from pages 13 to 21, and summarized is as follows:

On Dec. 5, 1945, Olender purchased with cashier check, purchased with cash, $25,000 worth of bonds (R. 451-2). On Nov. 23, 1945 Olender's mother wrote him that if he had no further use for the cash in the box to put it in Government bonds (R. 563); on Dec. 14, 1945, Olender's mother wrote him acknowledging the purchase of the bonds for her (R. 565); Olender purchased $25,000 in bonds, $20,000 thereof for his mother and put them in the safe deposit with the numbers of the bonds and his mother's name on the envelope (R. 566); in August of 1946 the Internal Revenue Department demanded that Olender explain the transaction of Dec. 5, 1945, involving the expenditure of the $25,000 (R. 559, 560); Olender answered stating that $20,000 thereof was the purchase of bonds for his mother with her money, etc., (R. 560-562); in May of 1948 the accountant Ringo made an inventory of the contents of the safe deposit box (R. 169) and found therein, in a bundle or envelope, the same bonds, listing them by number and amount, with some writing on the container showing that they were the property of Olender's mother (R. 229, 230 and 202-3); on July 13, 1953, the bonds were sold for the Estate of Mollie Olender (the mother who had since died) and a check therefor issued by the bank conducting the sale to Mollie Olender's Estate (R. 518, 520); that the check was deposited in Mollie

Olender's Estate. The net worth statement submitted by Olender to the Government in September 1948 (Introduced by the Government as U.S. Exhibit 10, R. 109, 233) lists $20,000 of the bonds on hand at the end of 1945 as belonging to Olender's mother.

Respondent argues against the foregoing unbroken line of evidence as follows (Br. in Opp. p. 10):

> "Petitioner rented a safe deposit box jointly with his mother and another jointly with his wife. The bonds were kept in the latter. (R. 222-223, 731.) They were in petitioner's possession from the time of purchase until the time of sale. (R. 565). He clipped the interest coupons and reported the interest earned in his 1947 individual income tax return. (R. 223-224, 569, 736, 744.) * * * The bonds were not reported on the mother's estate tax return filed by petitioner's sister, who was co-executor with him of the mother's estate. (R. 487-491, 740-742.) After petitioner's first trial he filed a 'supplemental inventory and appraisement' on behalf of the estate (on March 30, 1953) reporting the bonds as the mother's property for the first time. (R. 740-741) Treasury agents made an intensive examination of the banking transactions of petitioner's mother in an effort to learn whether she might have furnished the money for the bonds, but were unable to find transfers of funds or withdrawals of cash sufficient to account for them. (R. 483-484.)"

Respondent argues that the foregoing created a conflict in the evidence which the jury decided against petitioner.

Mere suspicion, surmise and conjecture do not create any conflict in the evidence; and that is all that the evidence amounts to relied on by respondent.

Irrespective as to which safe deposit box the bonds were kept in, Ringo, the prosecution's witness, testified that in early 1948 they were all earmarked as the mother's. Petitioner was not bound by nor responsible for any return made individually by petitioner's sister. However, this return has noted in pencil thereon "U.S. Government Bonds 20m", and contains the statement by petitioner's sister: "If there were any other transfers made" she had no record or knowledge thereof. (R. 490.)

As to the filing of the "supplemental inventory and appraisement" by petitioner after the first trial, this can have no probative effect. The first trial was in September, 1952; petitioner was convicted and appealed, the conviction was reversed by the Court of Appeals on Feb. 15, 1954, almost a year after the filing of the supplementary inventory. Clearly, the filing thereof after his conviction could not have been prompted by any ulterior motive.

Relative to the investigation by the revenue agents (R. 483-484) this shows that they only examined Mrs. Olender's accounts in the Fresno banks. Defendant's Ex. "P" shows that she had another account in an Oakland bank which had therein $8,000 at the time of her death and the letter she wrote to Olender on July 11, 1944 (R. 647) states that she kept cash on hand.

Thus, the unbroken line of evidence relative to these bonds, some of which was introduced by the Government, establishes that the $20,000 worth of bonds were petitioner's mother's and must be deducted from his net worth at the end of 1945, wiping out any claimed understatement of income. The evidence relied on by respondent does not refute this or create any conflict in the record.

Based upon the foregoing the case does not fall within the rule that where one is convicted on several counts, some of which are not supported by the evidence, the case will not be reversed if the judgment does not exceed what could have been pronounced under one good count of the indictment. Here there is no such situation.

It is respectfully submitted that the order denying the writ should be reversed, a rehearing granted and the writ should issue as prayed for in order that justice be done in the premises.

Dated, San Francisco, California,
February 6, 1957.

Respectfully submitted,
LEO R. FRIEDMAN,
*Attorney for Petitioner.*

CERTIFICATE OF COUNSEL.

Leo R. Friedman hereby certifies that he is a member of the Bar of the Supreme Court of the United States; that the foregoing Petition for a Rehearing is presented in good faith and not for delay; that the petition is restricted to the grounds set forth in Rule 58 of the Supreme Court.

Dated, San Francisco, California,
February 6, 1957.

LEO R. FRIEDMAN.